III. OPINIONS BELOW

The summary order of federal reciprocal disbarment entered on November 28, 2005 by the United States Court of Appeals for the Second Circuit is not reported. (App. 1-6) The *Weinstock* federal reciprocal disbarment order relied on *In re Friedman,* 51 F.3d 20, 22 (2nd Cir. 1995) (App. 7-12), a *per curiam* opinion which summarily held, without any factual or legal analysis or citation to any legal authority, that the application of the preponderance of the evidence standard to federal reciprocal disbarment proceedings does not violate due process.

The final order of federal reciprocal disbarment by the United States District Court for the Southern District of New York, entered on March 17, 2005 is not reported. (App. 13-14)

IV. JURISDICTION

The final judgment of the United States Court of Appeals for the Second Circuit was entered on November 28, 2005. (App. 1) On December 12, 2005 Petitioner filed a petition for rehearing with suggestion for rehearing *en banc* that was denied on January 11, 2006. (App. 15) This petition for writ of certiorari was filed with the Court within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

V. CONSTITUTIONAL PROVISIONS INVOLVED

Article IV § 2 Clause 1

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VI. STATEMENT OF THE CASE

The New York Disbarment Proceedings

Petitioner was admitted to practice in New York in 1960, to the Bar of the United States District Court for the Southern District of New York in 1961, and to the Bar of the United States Court of Appeals for the Second Circuit in 1993.

On March 13, 1997, New York Supreme Court Justice Lewis L. Douglass, a trial judge in Brooklyn, rendered a

decision in *Walker v. Weinstock* (App. 17-24) following a bench trial over disputed ownership of a corporation. Walker had sued Petitioner to rescind an assignment of stock on grounds of alleged coercion; the corporation's sole asset was a contract to purchase two apartment buildings. The trial judge did not make any findings regarding coercion because Walker admitted at trial that he fabricated those allegations. The trial judge found that Walker had never acquired any title to the stock he had assigned to the Petitioner, nor had he ever acquired any title to the real estate owned by the corporation. *Walker v. Weinstock*, 658 N.Y.S.2d 167, 168-171 (N.Y. Sup. Ct.-Kings County 1997). (App. 23-24) Nonetheless, the trial judge stated in *obiter dictum* that the assignment was unconscionable as the product of Petitioner's "overreaching and undue influence" over Walker (whom the court mistakenly identified as Petitioner's "client"), an allegation neither plead nor proven at trial. (App. 23-24)

In a separate matter, Petitioner and his wife had previously entered in a marital settlement agreement to divorce. The wife subsequently sued to set the agreement set aside. The trial court vacated the agreement because of the wife's incapacity to sign the agreement based on her addiction to valium. Petitioner appealed to the Appellate Division. On September 28, 1998, the Appellate Division held that the appeal "was completely without merit" and imposed $13,000 in sanctions on Petitioner. *Weinstock v. Weinstock*, 678 N.Y.S.2d 349, 350 (New York App. 1998). (App. 25-27)

On May 26, 1999, the Grievance Committee for the Second and Eleventh Judicial Districts of New York filed an application with the Appellate Division to institute disciplinary proceedings against Petitioner for professional

misconduct. The application was accompanied by a "confidential memorandum" that has never been provided to Petitioner. On November 16, 1999, the Appellate Division authorized the bar prosecution. (App. 28-29)

On December 14, 1999, the Grievance Committee filed charges for professional misconduct based on the opinions in *Walker v. Weinstock* and *Weinstock v. Weinstock*. (App. 30-34)

On July 21, 2000, the Grievance Committee filed a motion for summary judgment based on offensive collateral estoppel attaching the *obiter dictum* opinion rendered by the trial judge in *Walker v. Weinstock* and the appellate opinion rendered in *Weinstock v. Weinstock* for petitioner bringing an appeal hat "was completely without merit" as the only support for professional misconduct contained in the bar charges filed on December 14, 1999. (App. 35-43) In support of summary judgment the Grievance Committee argued to the Appellate Division that Petitioner had a full and fair opportunity to litigate the *obiter dictum* comment of "overreaching" by the trial judge in *Walker*. (App. 41-42) Other then the decisions in those cases the Grievance Committee did not provide the Appellate Division with any records and trial transcripts of the antecedent state court proceedings in either *Walker* or *Weinstock v. Weinstock*.

On December 15, 2000, the Appellate Division granted the motion, precluding Petitioner from contesting any factual issues underlying the allegations of professional misconduct, and ordered a mitigation hearing before a referee limited to sanctions. (App. 44-46)

On April 8, 2002, after more than 42 years of an unblemished practice, the Appellate Division summarily

disbarred Petitioner without an evidentiary hearing based on the trial judge's "overreaching" *obiter dictum* in *Walker v. Weinstock* and the sanction for taking an appeal "without merit" in *Weinstock v. Weinstock*. (App. 47-52) The order of disbarment was allegedly warranted because Petitioner, who insisted upon his innocence and right to be heard at an evidentiary hearing, "stubborn[ly] refus[ed] to acknowledge his misconduct." *In the Matter of Weinstock*, 740 N.Y.S.2d 128, 129-130 (N.Y. App. 2002).

On June 4, 2002, the New York Court of Appeals denied Petitioner leave to appeal. *In the Matter of Weinstock*, 733 N.E.2d 1016 (N.Y. 2002). (App. 53)

The Federal Court Reciprocal Disciplinary Proceedings

On December 8, 2004, the Grievance Committee for the United States District Court for the Southern District of New York issued an order requiring Petitioner to show cause why he should not be stricken from the attorney rolls of that court based on the Appellate Division's disbarment order of April 8, 2002. (App. 54-55)

On December 28, 2004, Petitioner timely filed a response to the order to show cause. Once again, Petitioner requested an evidentiary hearing on contested issues of fact that could not be presented at an evidentiary hearing at the antecedent New York disbarment proceedings, relying on *In re Jacobs*, 44 F.3d 84, 88 (2nd Cir. 1994); *In re Williams*, 398 F.3d 116, 119 (1st Cir. 2005); *In re Palmisano*, 70 F.3d 483, 485 (7th Cir. 1995); *In re Bird*, 353 F.3d 636, 638 (8th Cir. 2003) (material issues of fact unresolved in state disciplinary proceedings triggers evidentiary hearing in federal reciprocal disbarment

proceedings on those issues including mitigation). (App. 56-72)

On March 17, 2005, the Grievance Committee for the Southern District of New York entered a final order of federal reciprocal disbarment without an evidentiary hearing, relying entirely on the skeletal record in the Appellate Division proceeding that contained not a shred of testimonial or documentary evidence, nor even the testimonial record of the underlying proceedings in either *Walker v. Weinstock* or *Weinstock v. Weinstock*. (App. 13-14) After denial of rehearing on April 18, 2005, Petitioner filed a timely notice of appeal.

On October 17, 2005, the United States Court of Appeals for the Second Circuit issued a 24 day show cause federal reciprocal disbarment order under it original and inherent jurisdiction to discipline attorneys under Rule 46 of the Federal Rules of Appellate Procedure, based entirely on the New York disbarment order of April 8, 2002. (App. 73-74)

On October 20, 2005, Petitioner filed a timely response to the Circuit Court's reciprocal show cause disbarment order, once again requesting an evidentiary hearing before its Committee on Admissions and Grievances on contested issues of fact that could not be presented at an evidentiary hearing at the antecedent New York disbarment proceedings nor before the Committee on Grievances of the Southern District of New York, relying on *In re Jacobs*, 44 F.3d 84, 88 (2nd Cir. 1994); *In re Williams*, 398 F.3d 116, 119 (1st Cir. 2005); *In re Palmisano*, 70 F.3d 483, 485 (7th Cir. 1995); *In re Bird*, 353 F.3d 636, 638 (8th Cir. 2003) (material issues of fact unresolved in state disciplinary proceedings triggers evidentiary

hearing in federal reciprocal disbarment proceedings on those issues including mitigation). The purpose of an evidentiary hearing was to dispute contested issues of fact regarding allegations that Petitioner was guilty of "over-reaching" in a real estate transaction that had spawned the litigation and for mitigation. (App. 75-81)

On October 27, 2005, instead of conducting an evidentiary hearing before its Committee on Admissions and Grievances, the Court consolidated the original disbarment proceeding before it with the direct appeal of the federal reciprocal disbarment order rendered by the Grievance Committee of the United States District Court for the Southern District of New York for oral argument and decision.

On November 28, 2005, the Court imposed federal reciprocal disbarment in the original Second Circuit federal reciprocal disbarment proceeding, without the evidentiary hearing before the Committee on Admissions and Grievances that Petitioner had requested, and also affirmed the federal reciprocal disbarment order entered without an evidentiary hearing by the Grievance Committee of the United States District Court for the Southern District of New York. (App. 1-6)

On December 12, 2005, Petitioner timely filed a petition for rehearing with suggestion for rehearing *en banc*. On January 11, 2006, the Court denied rehearing. (App. 15-16)

Thus, to this day, Petitioner has never been given an opportunity for any kind of evidentiary hearing before any New York or federal disciplinary tribunal to contest charges that he engaged in "overreaching and undue influence" of a "client," an allegation first made in *obiter*

dictum by a New York trial judge despite the fact that it was neither plead nor proven, in a case in which the judge found that the plaintiff had never acquired any title to the stock he had assigned to Petitioner nor any title to the real estate the corporation owned. This *obiter dictum* was then used to disbar Petitioner by summary judgment, based on the offensive use of collateral estoppel, without a scintilla of evidence of professional misconduct warranting disbarment.

This timely petition for writ of certiorari follows.

VII. REASONS FOR GRANTING A WRIT OF CERTIORARI

A. The Second Circuit's Decision Applying New York's Preponderance of the Evidence Standard to Federal Reciprocal Disbarment Proceedings Directly Conflicts with Applicable Decisions of this Court, the Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and Federal Circuits, 42 States and the District of Columbia, Rule V(A) of the Rules of Federal Disciplinary Enforcement, and the Majority of Common Law Jurisdictions That All Require Clear and Convincing Evidence of Misconduct Before Sanctions May Be Imposed by a Professional Body on Any Licensed Fiduciary.

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The "profession of an attorney is of great importance to an individual, and the prosperity of his whole life

may depend on its exercise. *The right to exercise it ought not to be lightly or capriciously taken from him.*" *Ex parte Burr*, 22 U.S. 529, 530 (1824) (Emphasis added).

"The practice of law is not a matter of the State's grace." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, n.5 (1957). Though initial admission to practice before a United States court is derivative from membership in a state bar, disbarment by the state or a United States court does not necessarily result in disbarment by another United States court. Though any antecedent sanction by a state or United States court may be entitled to comity or preclusive effect on findings of fact, it is not conclusively binding on this Court or any other United States court. *In re Ruffalo*, 390 U.S. 544, 547 (1968); *Theard v. United States*, 354 U.S. 278, 281-82 (1957). And this is certainly true in cases where there is an infirmity of proof based on findings supported by less than clear and convincing evidence of professional misconduct.

This Court has held that a United States court may not give reciprocal or preclusive effect to a state disbarment where, upon "an intrinsic consideration of the state record, one or all of the following conditions should appear: (1) That the state procedure from want of notice or opportunity to be heard was wanting in due process; (2) that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a *clear conviction* on our part that we could not consistently with our duty accept as final the conclusion on that subject; or (3) that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the

principles of right and justice, we were constrained so to do." *Selling v. Radford*, 243 U.S. 46, 51 (1917).

It is black letter law that disciplinary proceedings are "quasi-criminal" in character. *In re Ruffalo*, 390 U.S. 544, 551 (1968). Because suspension or revocation of a license to practice law has a devastating impact on the reputation of affected counsel and destroys his or her livelihood, the Constitution requires a higher standard of proof. *Addington v. Texas*, 441 U.S. 418 (1979) (clear and convincing standard of proof required where the reputational interest at stake is greater than a mere money judgment); *Selling v. Radford*, 243 U.S. 46, 51 (1916) ("clear conviction" required for "proof as to facts found to have established the want of [an attorney's] fair private and professional character"); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (heightened due process protections required where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him").

A disciplinary proceeding against an attorney is comparable to a criminal rather than to a civil proceeding. Disbarment is punitive in nature with severe loss of reputation: "For most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine." *Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963). The power to withdraw that right must be exercised with "great caution" and "never to be exercised except in *clear* cases of misconduct, which affect the standing and character of the party as an attorney." *Ex parte Wall*, 107 U.S. 265, 288 (1882).

As this Court noted, "the possibility of mistaken fact-finding [is] inherent in all litigation." *Speiser v. Randall*,

357 U.S. 513, 526 (1958). In the light of this unavoidable uncertainty, the standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas,* 441 U.S. 418, 423 (1979).

In rejecting the preponderance of the evidence standard for civil commitment proceedings, this Court held that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427. A heightened evidentiary standard, while not adversely affecting the attorney disciplinary function, serves to "impress the fact finder with the importance of the decision and thereby perhaps reduce the chances that inappropriate" sanctions will be imposed. A heightened standard is particularly appropriate where, as here, government is threatening to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely." Chief Judge Henry J. Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1276-78 (1975).

In *In re Winship,* 397 U.S. 358, 367 (1970), this Court noted that the mere preponderance of the evidence standard may be inherently defective in failing to assure that factual determinations even reflect the weight of the evidence: the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted. The heightened standard of proof has been applied in other civil contexts where important interests like name and personal honor were at

stake. *Adams v. Henderson*, 168 U.S. 573, 579 (1897) (bill in equity to reform a contract); *Rosenbloom v. Metromedia.*, 403 U.S. 29, 50-52 (1971) (defamation action); *Woodby v. INS*, 385 U.S. 276, 285-286 (1966) (deportation proceedings); *Schneiderman v. U.S.*, 320 U.S. 118, 125 (1943) (denaturalization proceedings); *Chaunt v. U.S.*, 364 U.S. 350, 353 (1960) (same).

In *Addington*, this Court stressed that the clear and convincing standard of proof is applied "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant." 441 U.S. at 424. This due process requirement is imposed because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money," for the defendant risks having his reputation tarnished erroneously. By increasing the plaintiff's burden of proof, the risk of an erroneous determination is reduced. *Woodby v. INS*, 385 U.S. at 285, n.18. As here bar charges sometimes involve allegations of fraud, deceit or overreaching. The clear and convincing evidence standard has been required in cases involving allegations of fraud because such a finding stigmatizes the defendant, causing him harm beyond the mere loss of money. *Addington*, 441 U.S. at 424.

Expressly rejecting this Court's decision in *Addington v. Texas* as applied to disbarment proceedings, however, the New York Court of Appeals, has unequivocally declared that the practice of law is "classified as a property interest" and that "[t]he standard of proof for a determination of professional misconduct in an attorney's disciplinary proceeding is [therefore] by the fair preponderance of the evidence, not clear and convincing evidence." *Matter of*

Capoccia, 453 N.E.2d 497 (N.Y. 1983).[1] This troubling analysis by New York's highest court thus reduces the ability to practice a learned and venerable profession, whose practitioners are fiduciaries of the court, to nothing more than a mere license – while not an "insignificant privilege – a mere property interest nonetheless."

In re Capoccia has created a striking anomaly, vividly illustrated by this case and affecting disciplinary proceedings in New York generally. Like the majority of the common law world, New York demands "clear and convincing evidence" to prove fraud against anyone, no matter how villainous and no matter how purely monetary and relatively trivial the case may be. *Simcuski v. Saeli*, 377 N.E.2d 713, 717-718 (N.Y. 1978). So a lawyer sued for fraud cannot be held liable without clear and convincing evidence, even though only a money judgment is at stake, but that same lawyer may be suspended or disbarred, and his career destroyed, on no more than a preponderance of the evidence.

This anomaly dramatizes the failure of the *Capoccia* court to make the kind of rational analysis of the affected interests required by *Addington*. Requiring clear and convincing evidence of fraud to recover a dollar's damages but allowing total destruction of a professional career on a mere preponderance of evidence displays the kind of unconsidered incongruity that is the antithesis of due process at least as old as the Magna Carta-principles of

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[1] "By preponderance of evidence is meant that the superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other." BLACK'S LAW DICTIONARY 1201 (7th ed. 1999).

"fundamental fairness . . . and . . . rationality that is an essential component of that fairness." *Schad v. Arizona*, 501 U.S. 624, 637 (1991).

In summarily rejecting Petitioner's due process challenge to the application of New York's mere preponderance of the evidence standard to federal reciprocal proceedings, the *Weinstock* panel held that the argument was "squarely foreclosed" by a 1995 *per curiam* opinion in *In re Friedman*, 51 F.3d 20, 22 (2nd Cir. 1995). Yet this is all the *Friedman* Court ever stated regarding that standard of proof:

> Friedman claims on appeal that he was denied due process in two ways. He urges the district court's order of suspension was premature because he was not afforded a hearing; he also argues that the district court erred in accepting a state court disbarment order based on proof established by the preponderance of the evidence standard.
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> * * *
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> *We find persuasive on this point that the United States Supreme Court, following precisely the procedures employed by the Southern District, has also disbarred Friedman, and implicitly rejected Friedman's claim that the preponderance of the evidence standard of proof deprived him of due process. We thus join the several courts that have already rejected Friedman's constitutional arguments.*

Id. at 21-22. (Emphasis added)

The standard of proof in bar proceedings comporting with due process should be assessed by weighing the following interests which *In re Friedman*, 51 F.3d 20, 22 (2nd Cir. 1995) never addressed: (a) the attorney's interest

in avoiding the unwarranted imposition of grievous harm and *in terrorem* sanctions, (b) the public interest in avoiding the unwarranted removal of honorable attorneys, and (c) the public interest in securing by disciplinary sanctions protection from attorneys whose conduct departs from established professional norms and standards. Balancing these competing important public and private interests warrant the adoption by this Court of an evidentiary standard of proof that properly allocates to bar tribunals the responsibility to avoid a risk of erroneous deprivation given the horrific collateral consequences of *in terrorem* findings of quasi-criminal professional misconduct by an officer and fiduciary of the court. Fundamental fairness requires that before a federal court gives conclusive effect to a state court finding of unfitness to practice, it must assure itself that the individual received the due process expected in "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, at 551.

Every federal circuit that has considered the fundamental question of exceptional importance presented here have all held that the federal courts may only disbar an attorney upon presentation of clear and convincing evidence sufficient to support findings of professional misconduct warranting this extreme sanction. *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992); *In re Thatcher*, 190 F. 969, 1002 (6th Cir. 1911); *In re Fisher*, 179 F.2d 361, 369-370 (7th Cir. 1950); *In re Bird*, 353 F.3d 636, 641 (8th Cir. 2003); *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1436 (10th Cir. 1994); *In re Bell South*, 334 F.3d 941, 963 (11th Cir. 2003); *Jaskiewicz v. Mossinghoff*, 822 F.2d 1053, 1058 (Fed. Cir. 1987). See also, *In re Sheridan*, 362 F.3d 96, 111 at fn.18 (1st Cir. 2004); *In re Fallin*, 255 F.3d 195, 197 (4th Cir. 2001); *In re Crayton*, 192 B.R. 970, 975 (9th

Cir. BAP 1996); *In re Halperin*, 139 F.2d 361, 361 (D.C. Cir. 1943).

Under *In re Friedman*, the Second Circuit thus stands alone as the only circuit that permits federal reciprocal disbarment by less than clear and convincing evidence of misconduct.

Further, 42 states and the District of Columbia also require clear and convincing evidence of professional misconduct before the imposition of a disciplinary sanction, as integrity, reputation, and professional honor, once lost, is rarely restored. *Hucably v. Bar*, 631 So.2d 855 (Ala. 1993); *In re Giles*, 871 P.2d 693 (Ariz. 1994); *Arden v. Bar*, 739 P.2d 236 (Cal. 1967); *People v. Regan*, 871 P.2d 1184 (Colo. 1994); *Weiss v. Statewide Grievance Comm.*, 633 A.2d 282 (Conn. 1993); *In re Benge*, 783 A.2d 1279 (Del. 2001); *In re Sims*, 844 A.2d 353 (D.C. 2004); *In re Batista*, 846 So.2d 479 (Fla. 2003); *In re Burton*, 553 S.E.2d 579 (Georgia 2001); *Disciplinary Council v. Rapp*, 777 P.2d 710 (Hawaii 1989); *In re Jenkins*, 816 P.2d 335 (Idaho 1991); *In re Discipline*, 645 N.E.2d 906 (Ill. 1994); *In re Hughee*, 795 N.E.2d 450 (Ind. 2003); *Board v. D.J.I.*, 545 N.W.2d 866 (Iowa 1996); *In re Jarvis*, 869 P.2d 671 (Kan. 1994); *In re Quaid*, 646 So.2d 343 (La. 1994); *Grievance Comittee v. Bakas*, 589 A.2d 52 (Md. 1991); *In re Bailey*, 786 N.E.2d 337 (Mass. 2003); *In re Jensen*, 468 N.W.2d 541 (Minn. 1991); *Bar v. Shelton*, 855 So.2d 444 (Miss. 2003); *In re Wentz*, 87 P.3d 376 (Montana 2004); *Counsel for Discipline of the Nebraska Supreme Court v. Hart*, 708 N.W.2d 606 (Neb. 2005); *In re Schaefer*, 25 P.3d 191 (Nev. 2002); *O'Mearas Case*, 834 A.2d 233 (N.H. 2003); *In re Ort*, 631 A.2d 937 (N.J. 1993); *In re Horton*, 665 P.2d 275 (N.M. 1993); *In re Matter Palmer*, 252 S.E.2d 784 (N.C. 1979); *In re Larson*, 512 N.W.2d 454 (N.D. 1994); *Disciplinary*

Counsel v. Zingarelli, 729 N.E.2d 1167 (Ohio 2000); *Bar v. Farrant*, 867 P.2d 1279 (Okla. 1994); *In re Gygi*, 541 P.2d 1392 (Oregon 1975); *In re Shigon*, 29 A.2d 235 (Pa. 1974); *In re Watts*, 701 A.2d 319 (R.I. 1997); *In re Friday*, 208 S.E.2d 535 (S.C. 1974); *In re Jacquith*, 117 N.W.2d 97 (S.D. 1962); *Stanley v. Board of Professional Responsibility*, 640 S.W.2d 210 (Tenn. 1882); *In re McCullough*, 95 P.2d 13 (Utah 1939); *Bar v. Gunter*, 183 S.E.2d 713 (Va. 1971); *In re Wright*, 310 A.2d 1 (Vt. 1973); *In the Matter of Michaels*, 75 P.3d 950 (Wash. 2003); *Bar v. Smith*, 399 S.E.2d 36 (W.Va. 1990); *Bar v. Heilprin*, 207 N.W.2d 878 (Wisc. 1973); *Board v. Vidakovich*, 816 P.2d 885 (Wyo. 1991).[2]

Other common law jurisdictions reject disbarment rendered by less than clear and convincing evidence. The Judicial Privy Council, House of Lords, held in 1956 that "in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities. This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee."[3] *Bhandari v. Advocates Committee*, 3 All

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[2] New York is not alone in applying the preponderance of the evidence standard in disciplinary proceedings because the interest involved, a law license is considered a property interest. Seven other state jurisdictions are in accord. *In re Walton*, 676 P.2d 1078 (Alaska 1984); *In re Sexton*, 774 S.W.2d 1141 (Ark. 1989); *Bar v. Dungan*, 586 S.W.2d 15 (Ky. 1979); *Bar v. Dineen*, 481 A.2d 499 (Maine 1984); *Bar v. Posler*, 213 N.W.2d 133 (Mich. 1973); *In re Matter Warden*, 146 S.W.2d 740 (Mo. 1940); *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 277 (Tex. App. 2000).

[3] The Judicial Committee of the Privy Council of the House of Lords is the "final court of appeal of British constitutional and common

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English Reports 742, 744 (1956) (Emphasis added). Accord, *In re Hirt*, 34 DLR 4th 331, 333 (B.C. Court of Appeal 1993); *O'Reilly v. Law Society,* 24 NSWLR 202, 208 (New South Wales Supreme Court 1988).

Rule 18(C) of the ABA Model Rules for Lawyer Disciplinary Enforcement provides: "Standard of Proof. Formal charges of misconduct, lesser misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability inactive status shall be established by clear and convincing evidence." Rule V(A) of the Rules of Federal Disciplinary Enforcement also requires proof of misconduct supported by clear and convincing evidence and an evidentiary "hearing if the accused attorney wishes to dispute facts or to be heard in mitigation" which was not done in either of Petitioner's federal reciprocal disbarment proceedings below. See, *In re Bird*, 353 F.3d 636, 639 (8th Cir. 2003); *In re Medrano*, 956 F.3d 101, 102 (5th Cir. 1992).

As this Court also noted, "the possibility of mistaken fact-finding [is] inherent in all litigation." *Speiser v. Randall,* 357 U.S. 513, 526 (1958). In the light of this unavoidable uncertainty, the standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas,* at 423.

In repudiating the preponderance of the evidence standard for civil commitment proceedings, *Addington* held that "[t]he individual should not be asked to share equally with society the risk of error when the possible

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law adjudication." Sir William R. Anson, *The Law and Custom of the Constitution*, Pt. 2, 2d ed. (London: Henry Frowde, 1896) at 463-72.

injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427. A heightened evidentiary standard, while not adversely affecting the attorney disciplinary function, serves to "impress the fact finder with the importance of the decision and thereby perhaps reduce the chances that inappropriate" sanctions will be imposed. A heightened standard is particularly appropriate where, as here, government is threatening to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely." Friendly, at 1267.

In *In re Winship,* 397 U.S. 358 (1970), the Court noted that the preponderance of the evidence standard may be inherently defective in failing to assure that factual determinations even reflect the weight of the evidence: the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted. *Id.* at 367. In *Addington*, the Court noted that the clear and convincing standard of proof is applied "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant." 441 U.S. at 424. This requirement is imposed because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money," for the defendant risks having his reputation tarnished erroneously. As here bar charges sometimes involve allegations of fraud, deceit or overreaching. The clear and convincing evidence standard has been required in cases involving allegations of fraud because such a finding stigmatizes the defendant, causing him harm beyond mere loss of money.

Addington, 441 U.S. at 424. Hence, the "mere preponderance of the evidence" was inadequate. *Addington*, 441 U.S. at 423.[4]

Requiring the intermediate evidentiary standard of proof will not affect "the informality, flexibility, or speed of the hearing," *In re Winship,* 397 U.S. at 366. There is no empirical evidence that the overwhelming number of state and federal courts that have established the clear and convincing standard are encumbered by its efforts to enforce professional norms and standards to protect the public and uphold the dignity of the courts. Fundamental fairness demands an intermediate standard of proof that provides a manageable deterrent to attorney misconduct. Further, the more likely than not preponderance of the evidence standard can have the deterrent chilling affect of keeping more vigorous and zealous advocates on a short leash as an instrument of summary judicial control, abuse and retaliation.). Comment, *Lawyer's Responsibilities and Lawyer Discipline*, 107 Harv. L. Rev. 1547, 1642-1645 (1994) (discussing the "chilling affect"). See e.g., *Sacher v. Association of the Bar of the City of New York*, 347 U.S. 388 (1954); *Dennis v. U.S.*, 341 U.S. 494 (1951); *In re Sawyer,* 360 U.S. 622 (1959); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Mackler Productions v. Cohen*, 146 F.3d 126, 128 (2nd Cir. 1998) (There are troublesome aspects

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[4] In *Steadman v. SEC*, 450 U.S. 91 (1981) the Court sustained the application of the preponderance of the evidence standard in SEC disciplinary proceedings of a licensed securities dealer charged with professional misconduct rather than by clear and convincing evidence standard on statutory construction grounds under the Administrative Procedures Act, 5 U.S.C. § 554. Curiously, *Steadman* abandoned his argument that due process required proof by clear and convincing evidence in SEC disciplinary proceedings. *Id.* at 97, n.15.

'inherent in imposing sanctions, especially when the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of a procedural code'). The more likely than not preponderance of the evidence standard achieves that at the risk of "chilling" meritorious claims summarily sanctioned as "frivolous", "vexatious", "unfounded" or brought in "bad faith" which manifests itself in two ways: (1) attorneys are less likely to file some meritorious claims that they might otherwise have pursued, and (2) attorneys are less likely to make novel legal arguments that might otherwise have prevailed. The consequence of the former is the non-vindication of substantive rights, while the latter is the stultification of the law.

The standard of proof in bar proceedings comporting with due process should be assessed by weighing the following interests: (a) the attorney's interest in avoiding the unwarranted imposition of grievous harm and *in terrorem* sanctions, (b) the public interest in avoiding the unwarranted removal of honorable attorneys, and (c) the public interest in securing by disciplinary sanctions protection from attorneys whose conduct departs from established professional norms and standards. Balancing these competing important public and private interests warrant the adoption by this Court of a national uniform evidentiary standard of proof in that properly allocates to bar tribunals the responsibility to avoid a risk of erroneous deprivation given the horrific collateral consequences of *in terrorem* findings of willful quasi-criminal professional misconduct by an officer and fiduciary of the court. Due process and fundamental fairness require no less – a finding of professional misconduct by an officer of the court supported by clear and convincing evidence. Before a

federal court gives conclusive effect to a state court finding of unfitness to practice, it must assure itself that the individual received the due process expected in "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1968).

B. Importing the Preponderance Standard to Federal Reciprocal Disbarment Proceedings Violates the Privileges and Immunities Clause And Equal Protection

The absence of uniformity among the several states regarding the standard of proof to be applied in federal reciprocal disbarment proceedings raises additional constitutional concerns. Article IV, § 2 of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975); *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 94 (2nd Cir. 2003), and had the primary purpose of "fusing into one Nation a collection of independent, sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *Supreme Court v. Friedman*, 487 U.S. 59, 64 (1988). "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer*, 334 U.S. at 395. It operates to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1869). Indeed, "the Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right

to non discriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin*, 420 U.S. at 662.

This Court has unequivocally held that the right to practice law is protected by the Privileges and Immunities Clause. New York, Connecticut and Vermont lie within the Second Circuit, and New York attorneys are often licensed in nearby Connecticut, New Jersey, Pennsylvania and also Florida which all require clear and convincing evidence. By the *Weinstock* panel affirming that *In re Friedman* as squarely forecloses due process challenge to the preponderance of the evidence standard in the Second Circuit as applied to federal reciprocal disbarment proceedings arising from antecedent New York disciplinary findings, the absurd anomaly is then created where an attorney will be disbarred by the four New York district courts for conduct on proof which would not pass muster by the Connecticut and Vermont district courts or by the New Jersey, the three Pennsylvania and the three Florida district courts, jurisdictions where a significant number of New York attorneys are also licensed. *Weiss v. Statewide Grievance Comm.*, 633 A.2d 282 (Conn. 1993) (clear and convincing evidence as the practice of law is a liberty interest); *In re Wright*, 310 A.2d 1 (Vt. 1973) ("clear and free from doubt" as the practice of law is a liberty interest). A hypothetical example proves the point. A member of the bar of this Court licensed to practice in New York, Connecticut and Vermont, published a regional advertisement about his or her services that a New York disciplinary prosecutor contends is false and misleading. The allegation can be factually supported by a preponderance of the evidence, but not by such clear and convincing evidence as required by Connecticut and Vermont. It

would violate the Privileges and Immunities Clause for this Court to impose federal reciprocal disbarment on that attorney for conduct deemed improper by New York but not by Connecticut and Vermont.

At the heart of equal protection is the principle that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Allen v. Cuomo*, 100 F.3d 253, 260 (2nd Cir. 1996) (citing *City of Cleburne*, 473 U.S. at 439). The Fifth Amendment does not contain an explicit equal protection clause. However, the Court has implied equal protection in the Fifth Amendment's due process clause. *Mathews v. De Castro*, 429 U.S. 181, 182 n.1 (1976). Thus, due process prevents the federal government from "engaging in discrimination that is ... violative of due process." *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). The "standards for analyzing equal protection claims under either amendment are identical." *Nicholas v. Tucker*, 114 F.3d 17, 19 (2nd Cir. 1997). Indeed, the "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law". *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Imposing reciprocal disbarment upon Petitioner would violate equal protection by treating him differently than similarly situated members of the bar of this Court who hale from Connecticut or Vermont. Hence, the requirements of equal protection preclude this Court from treating its New York members differently then its members from Connecticut and Vermont. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Eisenstadt v. Baird*, 405 U.S. 438, 447-448 (1972).

VIII. CONCLUSION

"Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial"

(Cassio, in Othello, Act 2, Scene 3) William Shakespeare

The petition for writ of certiorari should be granted to review the Second Circuit's acquiescence and conformity to a New York common law rule of evidence applied to federal reciprocal disbarment proceedings, a rule that only requires proof of professional misconduct by a fiduciary based on the mere balance of probabilities because the New York Court of Appeals treats a fiduciary license to practice law as a mere property interest, a decision that is overwhelmingly in conflict with the numerous decisions of the various sister circuits and the numerous district courts that sit within those circuits, forty-two states, the District of Columbia as well as Great Britain, Canada and Australia; common law jurisdictions that will only disbar in clear cases of misconduct, which affect the standing and character of an attorney where acts of deceit or moral turpitude are alleged, because no professional body sitting in judgment of a licensed fiduciary should be content to condemn on a mere balance of probabilities. Petitioner's due process attack of the preponderance of the evidence applied to federal reciprocal disbarment proceedings constitutes an "infirmity of proof" of professional misconduct under *Selling v. Radford*, 243 U.S. 46, 51 (1917). Under *Radford*, Petitioner's challenge to the sufficiency of proof of professional misconduct in the antecedent New York disbarment cannot succeed in federal reciprocal disbarment proceedings if the evidence relied on by the state court was based on *obiter dictum*, evidence so infirm as to give rise to a

clear conviction that the federal courts should not accept the state court's findings. *Selling*, 243 U.S. at 51.

It is clear that certiorari is warranted here as this Court needs to establish under it supervisory powers over the United States courts a national uniform standard of proof to be applied in federal reciprocal disbarment proceedings for all attorneys admitted to federal practice. The Second Circuit decision stands alone and is overwhelmingly in conflict with the applicable decisions regarding the standard of proof to applied in federal reciprocal disbarment proceedings of the Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh and Federal Circuits as well as the several district courts that have adopted the Federal Rules of Disciplinary Enforcement.

Respectfully submitted,

ROBERT S. CATZ
Counsel of Record
1600 28th Street, N.W.
Washington, D.C. 20007
(202) 276-6088

MARK H. SHENFIELD
730 Harrison Street, Suite 201
San Francisco, California 94107
(415) 495-3119

Attorneys for Petitioner

March 6, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 28th day of November, two thousand and five.

PRESENT:

HON.
JOSEPH M. McLAUGHLIN,
HON. GUIDO CALABRESI,
HON.
BARRINGTON D. PARKER,
Circuit Judges.

In Re: Israel Weinstock,

Respondent.

GRIEVANCE COMMITTEE,

Petitioner-Appellee,

v.

ISRAEL WEINSTOCK,

Respondent-Appellant.

Nos.
05-2672-cv, 05-8302-cv

For Respondent-Appellant: ISRAEL WEINSTOCK, *pro se* (Robert S. Catz, Washington, D. C., *on the brief*), Belle Harbor, N.Y.

Appeal from an order of disbarment entered in the United States District Court for the Southern District of New York (Rakoff, *J.*), and motion for revocation of an order of disbarment entered by the Court of Appeals.

(Filed Nov. 28, 2005)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the disbarment order of the district court is **AFFIRMED**, the motion to revoke this court's disbarment order is **DENIED**, and the request for an evidentiary hearing is **DENIED**.

By order of April 8, 2002, the New York State Supreme Court, Appellate Division, Second Department sustained four charges of professional misconduct against Attorney Israel Weinstock and ordered his disbarment.[1]

[1] Weinstock was found to have committed the following violations of the Disciplinary Rules of New York's Code of Professional Responsibility: (1) engaging in conduct involving overreaching and coercion that adversely reflects on his fitness to practice law, in violation of DR 1-102(a)(8) (since changed to 1-102(a)(7)), 22 NYCRR 1200.3[a][8] (since relocated to 1200.3[a][7]),

(2) improperly acquiring a proprietary interest in the subject matter of the litigation he was conducting for a client, in violation of DR 5-103, 22 NYCRR 1200.3,

(Continued on following page)

In re Weinstock, 740 N.Y.S.2d 128 (App. Div.2d Dep't 2002). On March 17, 2005, the Grievance Committee for the United States District Court for the Southern District of New York issued an order of reciprocal disbarment, pursuant to S.D.N.Y. Local Civil Rule 1.5(d)(2), after considering Weinstock's written response to an order to show cause why reciprocal disbarment should not be imposed. Pursuant to Second Circuit Local Rule 46(f)(1), the Second Circuit entered an order on October 17, 2005, disbarring Weinstock from practice before this court. Weinstock appeals the district court's disbarment order and moves to have the Second Circuit's disbarment order revoked. He also seeks the appointment of a special master to conduct an evidentiary hearing pursuant to Federal Rule of Appellate Procedure 46(b)(3) and Local Rule 46(f). We have consolidated Weinstock's challenges to the two disbarment orders.

We assume the parties' familiarity with the facts, the procedural history, and the specification of issues on review.

Before imposing or affirming reciprocal disbarment, federal courts are required to conduct only the "limited review" prescribed by *Selling v. Radford*, 243 U.S. 46, 50-51 (1917). *In re Edelstein*, 214 F.3d 127, 131 (2d Cir.2000). *Selling* identified three grounds why reciprocal disbarment should not be imposed: "(1) absence of due process in the state procedure, (2) substantial infirmity in the proof

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(3) engaging in conduct prejudicial to the administration of justice, in violation of DR 1-102(a)(5), 22 NYCRR 1200.3[a][5], and

(4) engaging in legal action merely to harass or to injure another maliciously, in violation of DR 7-102(a)(1), 22 NYCRR 1200.33[a][1].

of lack of private and professional character, or (3) 'some other grave reason' sufficient to indicate that reciprocal disbarment was inconsistent with 'principles of right and justice.'" *In re Tidwell*, 295 F.3d 331, 334 (2d Cir.2002) (quoting *Selling*, 234 U.S. at 51). Because none of these conditions is met here, we affirm both orders of reciprocal disbarment.

Weinstock's principal argument is that due process requires that professional misconduct be proved by clear and convincing evidence. Accordingly, he contends that findings of misconduct by a preponderance of the evidence, which is the standard in New York state disciplinary proceedings, cannot support reciprocal disbarments. This argument, however, is squarely foreclosed by *In re Friedman*, a case that Weinstock fails to mention in his brief. *Grievance Comm. v. Friedman* (*In re Friedman*), 51 F.3d 20, 22 (2d Cir.1995) ("[Friedman] argues that the district court erred in accepting a state court disbarment order based on proof established by a preponderance of the evidence. . . . We reject [this] contention[ ].").

Weinstock makes several other, equally unavailing arguments. Most of these were not raised before the district court, so we do not need to consider them insofar as they apply to Weinstock's appeal from his disbarment by the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir.2005). We do, however, examine his contentions insofar as they bear on the validity of this court's disbarment order.

For example, Weinstock asserts, for the first time before us, that statements in New York Supreme Court and Appellate Division opinions that he had engaged in

overreaching and coercion were only dicta, so that it was error and a violation of due process for the Appellate Division to hold Weinstock collaterally estopped from contesting the facts of his professional misconduct in his disciplinary proceedings. *See Walker v. Weinstock* (*Walker II*), 680 N.Y.S.2d 177, 177 (App. Div.2d Dep't 1998); *see also Walker v. Weinstock* (*Walker I*), 658 N.Y.S.2d 167, 171 (Sup.Ct.1997). Regardless of whether the Appellate Division was correct with respect to the collateral estoppel effect of *Walker II* on the charge under DR 1-102(a)(8) (overreaching and coercion), Weinstock does not deny that *Walker II* collaterally estopped him from challenging the DR 5-103 charge (improperly acquiring a proprietary interest in the subject matter of the litigation), or that he was collaterally estopped by *Weinstock v. Weinstock*, 672 N.Y.S.2d 908 (App. Div.2d Dep't 1998), from challenging the charges under DR 1-102(a)(5) (conduct prejudicial to the administration of justice) and DR 7-102(a)(1) (engaging in legal action merely to harass or to injure another maliciously). Because these violations were adequate to support Weinstock's disbarment, we cannot conclude that the alleged collateral estoppel error rose to the level of a violation of due process, as it must, under *Selling*, for us to conclude that reciprocal disbarment is inappropriate.

Weinstock asserts that he is entitled to a plenary evidentiary hearing on allegations of prosecutorial misconduct by the New York bar counsel. Second Circuit Local Rule 46(f)(4) does permit the court to appoint a special master to conduct a hearing and report on disputed matters relating to whether reciprocal discipline should be imposed. But while Weinstock has made unsubstantiated allegations of prosecutorial misconduct and corruption, he has not alleged any facts that impugn the fairness of the

judicial proceedings which resulted in his disbarment. For this reason, an evidentiary hearing is not necessary. Nor does Federal Rule of Appellate Procedure 46(b)(3), which mentions that a hearing may be held prior to entry of the order, create a right to an evidentiary hearing on a reciprocal disbarment. *See In re Williams*, 398 F.3d 116, 119 (1st Cir.2005) ("In the usual case, the hearing will be on the papers, supplemented by oral argument addressed to the respondent attorney's specific challenges to the conduct and outcome of the state proceedings.").

We have considered all of Weinstock's other contentions and find each of them to be without merit.

Accordingly, we AFFIRM the disbarment order of the district court, DENY the motion for revocation of this court's disbarment order, and DENY the request for an evidentiary hearing.

For the Court,
ROSEANN B. MACKECHNIE,
Clerk of Court

by: /s/ Lucille Carr

In Re: THEODORE H. FRIEDMAN, GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK, Petitioner-Appellee, v. THEODORE H. FRIEDMAN, Respondent-Appellant.

Docket No. 94-7671

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

March 15, 1995, Argued March 28, 1995, Decided

COUNSEL:

MARVIN E. FRANKEL, Kramer, Levin, Naftalis, Nessen, Kamen & Frankel, New York, New York for Respondent-Appellant.

DANIEL L. BROCKETT, Squire, Sanders & Dempsey, New York, New York (Hal R. Lieberman, Chief Counsel, Departmental Disciplinary Committee of Appellate Division, First Department, New York, New York), for Petitioner-Appellee.

JUDGES: BEFORE: MESKILL, CARDAMONE, and ALTIMARI, Circuit Judges.

OPINION:

Per Curiam:

Respondent-appellant Theodore H. Friedman appeals from an Order entered in the United States District Court for the Southern District of New York (Patterson, J.), suspending him from practice in the Southern District until such time as he is reinstated to practice in the state courts of New York.

Background

Friedman was disbarred from practice in the state courts by order of the New York Appellate Division, First Department, after lengthy disciplinary hearings culminating in the finding, by a Special Referee, that he had engaged in professional misconduct. As a result, Judge Patterson, as Chairman of the Southern District Grievance Committee, entered an Order to Show Cause on April 4, 1994, directing respondent to demonstrate why reciprocal discipline should not be imposed pursuant to Southern District General Rule 4(d). The order gave Friedman thirty days in which to respond. On the thirtieth day, his counsel wrote to the district court asking for a stay of federal disciplinary proceedings, pending the outcome of his request for leave to appeal to the New York Court of Appeals. In his letter, counsel also advanced two substantive arguments in opposition to the suggestion that reciprocal discipline would be appropriate.

The first of these arguments was that the federal courts were constitutionally required to employ a higher standard of proof of misconduct in disbarment proceedings than that employed by the New York courts. New York requires proof by a preponderance of the evidence. The second argument rested on preclusion principles. We summarize the facts upon which the preclusion theory was based.

In the early 1980s, Friedman tried a personal injury case in the Southern District of New York before then-district Judge Leval. After the jury returned a verdict for Friedman's client, it was discovered that an unreceived exhibit had made its way into the jury room. Friedman submitted an affidavit to the district court in which he laid the blame

on co-counsel who, because he was out of the country at the time, was unaware of the post-verdict proceedings. Following a hearing at which he heard testimony, Judge Leval published an opinion in which he found that respondent had willfully tampered with the evidence. *See Red Star Towing & Transp. Co. v. "Ming Giant"*, 552 F. Supp. 367, 382-85 (S.D.N.Y. 1982), modified on other grounds, 563 F. Supp. 224 (S.D.N.Y. 1983).

Respondent was subsequently charged with four counts of professional misconduct by a panel appointed by the Committee on Grievances of the Board of Judges of the Southern District of New York to investigate the matter. Pursuant to an agreement, respondent admitted to having filed a false and misleading affidavit. In exchange, the Committee agreed to drop the other charges. In a letter of censure, the Honorable Vincent L. Broderick noted that the remaining three charges had not been the subject of any findings and said, "[w]e recognize, of course, that given the admission to the second charge in lieu of a full hearing on all the charges, those other charges may not be the basis of other proceedings against you." Letter of Hon. Vincent L. Broderick, June 23, 1986. [J.App. at 115.]

The Appellate Division, First Department conducted an independent review of the matter when the same conduct was made the basis of the six counts of wrongdoing referred to its Departmental Disciplinary Committee. All but one count was found to have been established by a fair preponderance of the evidence by the Honorable Donald J. Sullivan, Special Referee. The Special Referee contemporaneously addressed misconduct charges flowing from two other personal injury cases. A total of fourteen charges were sustained by the Special Referee, including the charge of submitting a false affidavit to the federal bench.

The Special Referee recommended a suspension of two years as a sanction for Friedman's conduct. Confirming all but one of the Special Referee's findings, the Appellate Division rejected the proposed sanction as too lenient. *In re Friedman*, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1st Dep't 1994) (per curiam). Accordingly, it disbarred him from the practice of law in the state of New York.

After directing Friedman to show cause why reciprocal discipline was inappropriate and after receiving two letter submissions in response, Judge Patterson disbarred him from practice in the Southern District by Order dated May 26, 1994.

Since then, the New York Court of Appeals has dismissed his appeal on the ground that no constitutional issue was presented, 83 N.Y.2d 888, 635 N.E.2d 295, 613 N.Y.S.2d 126 (1994), and the United States Supreme Court has denied his petition for a writ of certiorari, 115 S. Ct. 81 (1994). Furthermore, the Supreme Court has recently disbarred respondent from practice before it, 115 S. Ct. 629 (1994), as a result of the same charges underlying the appealed-from district court Order, *see* 115 S. Ct. 48 (1994) (mem.). In addition, the Appellate Division, First Department effectively denied a motion for reargument that, unbeknownst to Judge Patterson, was pending at the time the district court issued the Order of disbarment. *See* Order of the First Dep't, M-1814. [J. App. at 28.]

Discussion

Friedman claims on appeal that he was denied due process in two ways. He first urges that the district court's order of suspension was premature because he was not afforded a hearing; he also argues that the district court erred in

accepting a state court disbarment order based on proof established by a preponderance of the evidence. Finally, Friedman makes the preclusion argument recited above. We reject these contentions.

We first note that Friedman elected to respond to the district court's show cause Order by seeking, on the thirtieth day, a stay. However, his letter submissions contained the substance of reasoned arguments in opposition to the suggestion of disbarment. Further, a copy of the memorandum submitted on Friedman's behalf to the New York Court of Appeals, setting forth his constitutional arguments, was attached to the first of the letters. It is accordingly apparent that these arguments were before the district court when it made its decision. The district court was also possessed of the knowledge that the New York Court of Appeals had dismissed the direct appeal. Even if the district court had not been apprised of Friedman's theories, however, this Court would not be inclined to intervene. Respondent's approach to the district court's Order to Show Cause was, in essence, a demand for an extension of time which the district court was in no way obligated to grant.

The district court is required to "examine the state proceeding for consistency with the requirements of due process, adequacy of proof and absence of any indication that imposing discipline would result in grave injustice." *In re Jacobs*, 44 F.3d 84, 88 (2d Cir. 1994) (citing *Selling v. Radford*, 243 U.S. 46, 51, 61 L.Ed. 585, 37 S. Ct. 377 (1917)). Friedman reasons that, because the district court did not conduct a hearing, it did not examine the state proceeding as it was bound to do. We reject this premise. The district court had before it the relevant facts and detailed legal arguments, including those that addressed New York's alleged constitutional inadequacies. Despite Friedman's insistence, the

Southern District rules do not require a hearing. Rather, they require the "opportunity to be heard." Local Rule 4(d), (g); *see also In Re Jacobs*, 44 F.3d at 90.

As *Selling* makes clear, it was Friedman's burden to demonstrate by clear and convincing evidence that, in this case, the New York procedures were wanting. Friedman was represented by counsel throughout lengthy hearings in which he was able to call his own witnesses, cross-examine and submit legal memoranda and proposed findings of fact. The district court's implicit conclusion that Friedman failed to carry his burden is not erroneous. We find persuasive on this point that the United States Supreme Court, following precisely the procedures employed by the Southern District, has also disbarred Friedman, and implicitly rejected Friedman's claim that the preponderance of the evidence standard of proof deprived him of due process. We thus join the several courts that have already rejected Friedman's constitutional argument.

We also reject the preclusion argument. Were the *Red Star Towing* arguments the only basis for the state court's disbarment action, and the reciprocal Southern District discipline, this argument would have more force. It is incontrovertible, however, that even absent the grave charges at issue in that proceeding, other serious and substantiated charges remained which amply justify the district court's suspension of Friedman.

Conclusion

For these reasons, the Order of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of Israel Weinstock 140-06 Rockaway Beach Boulevard Belle Harbor, NY 11694, Respondent	M-2-238 ORDER

By Order dated April 8, 2002 of the Supreme Court of the State of New York, Appellate Division, Second Department (copy here attached), respondent Israel Weinstock, a member of the bar of this Court, was removed from the roll of practicing attorneys by the State of New York for engaging in conduct involving overreaching and coercion that adversely reflects on his fitness to practice law in violation of DR 1-102(a)(7), improperly acquiring a proprietary interest in the subject matter of the litigation he was conducting in violation of DR 5-103, engaging in conduct prejudicial to the administration of justice in violation of DR 1-102(a)(5), and engaging in legal action merely to harass or maliciously injure another in violation of DR 7-102(a)(1); and by Order To Show Cause of the instant Court dated December 8, 2004, issued pursuant to S.D.N.Y. Local Civil Rule 1.5(d)(1), respondent was directed to show cause by December 28, 2004 why he should not be stricken from the roll of practicing attorneys of this Court. After careful consideration of his timely response in which he claims his New York State disbarment order is void for, *inter alia*, lack of due process, being predicated on an unconstitutional evidentiary standard, and improper

retaliatory motive, the court, by its Grievance Committee, has decided that the respondent failed to provide the requisite clear and convincing evidence why reciprocal disbarment should not be imposed. *See* S.D.N.Y. Local Civil Rule 1.5(d)(2). Accordingly, the Clerk of the Court is hereby directed to strike Israel Weinstock from the roll of practicing attorneys of this Court, effective immediately.

SO ORDERED.

/s/ Jed S. Rakoff
JED S. RAKOFF
Chair, Committee on
Grievances S.D.N.Y.

Dated: New York, New York
March 17, 2005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	1/9/06
Docket Number:	05-2672-cv
Short Title:	In Re: Israel Weinstock v.
DC Docket Number:	M2-238
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Jed Rakoff

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the ___ day of ___ two thousand five.

Present:

Hon. Joseph M. McLaughlin,
Hon. Guido Calabresi,
Hon. Barrington D. Parker,

Circuit Judges

Grievance Committee,

Petitioner-Appellee,

v.

Israel Weinstock,

Respondent-Appellant.

(Filed Jan. 11, 2006)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant, Grievance Committee. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing en banc is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ Arthur Heller
Motion Staff Attorney

Jack WALKER et al., Plaintiffs,

v.

Israel WEINSTOCK et al., Defendants.

Supreme Court, Kings County, March 13, 1997.

OPINION OF THE COURT

LEWIS L. DOUGLASS, J.

This is an action for a declaratory judgment to determine whether the plaintiffs or the defendants are the owners of 4200 and 4211 Avenue K, buildings on the opposite sides of the street, which in this litigation are treated as a single building consisting of 191 units.

In the early 1970's, the buildings were owned by the plaintiff Emmerich Handler whose primary business is investing in real estate. When oil prices increased in the middle 1970's and the building, therefore, was no longer profitable, he allowed a bank to foreclose. In the late 1970's, when market conditions changed and the buildings again became potentially profitable, he initiated steps to reacquire the buildings.

Handler's primary method of operation was to identify potentially profitable buildings and offer various acquaintances the opportunity to invest in those buildings. In order to limit his personal liability, he would take title in the name of a close corporation, sometimes referred to as a paper corporation. None of the ritual associated with organizing corporations was followed. A lawyer in his office would merely fill out a Certificate of Incorporation form and submit it to the Secretary of State. That practice was followed in connection with the buildings involved in this litigation in that a contract was to be drawn to show 4200 Avenue K Realty Corp. as the buyer.

Handler then approached one of his acquaintances (Fred Pheffer) and offered him the opportunity of investing $50,000, which was to be used for the down payment. That $50,000 "interest" was eventually assigned to another potential investor (Sheldon Hertz) and then to Jack Walker, a plaintiff herein. The nature of Jack Walker's interest is one of the issues this court must resolve.

WHAT IS THE NATURE OF JACK WALKER'S INTEREST

The thrust of the defendants' argument is that since the only capital in the corporation was the $50,000 used for the down payment, the corporation belonged to the person who put up that $50,000, and then to that person's final assignee, Jack Walker. The logical extension of that argument is that the method for expressing that ownership is to treat Jack Walker as the owner of all the stock in the paper corporation so that if Jack Walker transferred his "interest" in the property, the transfer would be expressed as a transfer of stock.

Plaintiffs argue that since no stock was ever issued, no bylaws were created, no bank accounts were established, and all conversations between Handler, who developed the deal, refer to "investing" in the building rather than "buying" stock in the corporation, that Walker acquired no ownership in stock, but merely acquired the right to share in profits in proportion to his investment.

If the nature of the "interest" is ownership in the stock, then the defendant Weinstock prevails since his claim of ownership is based on a purported transfer of 20% of the stock and a second purported transfer of 80% of the stock by Walker to Weinstock. If, however, the nature of that interest is merely the right to share in profits, the

plaintiffs prevail since when Walker purported to transfer, first 20% and then 80% of the stock, he was transferring something he did not own. That is, he purported to transfer stock, but only owned a right to share in profits.

THE MANIFEST INTENT OF THE PARTIES' CONTROLS

The payment of $50,000 by the initial investor and the ultimate assignment to Walker was an agreement between Handler, the person who was arranging the deal, the first assignee, and then Walker. There are no stock certificates or written agreement between any of these parties which would establish the terms of that agreement.

In the absence of a clear writing, terms of any agreement are determined by the manifest intention of the parties, that is, what would a reasonably prudent person believe was the intention of the parties at the time the contract was made (*Porter v. Commercial Cas. Ins. Co.*, 292 NY 176). Here, the facts surrounding the investment are that Handler discovered the deal, Handler was in the business of syndicating real estate, and Handler was an expert. Handler hired the lawyers and, through the past ten years of litigation, all parties have identified Handler as the moving force behind the deal. Indeed, Weinstock, during his testimony, would shout "Handler's behind the whole thing," "Walker is a pawn." Although these outbursts were caused by emotional stress and designed to portray Handler as an evil force, they are also evidence that Weinstock always knew this was Handler's deal.

Walker's background is that he graduated from dental school, never practiced, and spent his active years in a watch business started by his father-in-law. From time to time, he invested in real estate deals, usually through

Handler's law firm. He attempted to operate his own housing complex, but that ended with him having to repay large amounts that he misappropriated. It is clear from his background and demeanor on the stand that Walker had become involved with the lawyers in this transaction, all of whom were tougher and more knowledgeable than Walker. He was a novice in over his head.

Against this background, it is totally improbable that the manifest intent, that is, the intent that would be ascertained by a third party viewing this situation, would be that the parties intended that Handler, the real estate expert who discovered the deal, would turn it over to Walker, the novice, and end up with no ownership position.

I conclude, therefore, that where a person invests in real estate which is to be syndicated, that investor acquires no title to the real estate or to the shares in the stock of a corporation which may hold title to such real estate, but merely acquires a right to become a passive investor with the right to share in profits or losses in proportion to his investment, but no right to manage, sell, or transfer the stock of any corporation in which title may be held.*

---

* Although events subsequent to the making of a contract are not conclusive evidence of the intent of the parties at the time of the making of the contract, credence is given to this finding of manifest intent when the parties act in accordance with the manifest intent as found by the Court. Here, after acquiring the building, Handler eventually created a limited partnership, filed Federal tax returns, and Walker appeared on those returns, not as a principal, but consistent with the view that no one ever intended Walker would be anything more than a passive investor; he appeared on those returns as a limited partner.

Even assuming arguendo that Walker had the authority to transfer *stock, the transfers must be set aside as unconscionable.*

Weinstock's claim of ownership of the stock in the corporation is based upon two purported transfers to him by Walker: first for 20%, and second, for 80%.

THE PURPORTED 20% TRANSFER

According to Weinstock, he had an oral agreement with Walker that if he would handle the appeal from a trial seeking to compel the original owner to convey title to the Handler group, his fee would be 20% of the stock in the corporation. This was much like a contingent fee. If he won, he would be a 20% owner of a building worth over $4,000,000 with a cash flow of $260,000 a year. If he lost, he had nothing.

Although that might be viewed as an extraordinarily high fee, in view of the fact that in the first trial the verdict was against Handler and Walker, and Weinstock was being asked to get that verdict reversed and handle a second trial, 20% of the stock, standing alone, does not seem so unconscionable as to declare the contract void. It does, however, become unconscionable when the agreement is coupled with the circumstances surrounding the purported second transfer of 80 percent of the stock as discussed here.

THE PURPORTED 80% TRANSFER

Weinstock argues that he acquired full ownership in 4200 Avenue K Realty Corp. because Walker later

transferred the balance of what he owned, that is, 80%, to Weinstock.

This 80% transfer arises out of the fact that Walker had commenced a fraud action against Weinstock, alleging that Weinstock had signed Walker's name to a contract of sale to a piece of real estate unrelated to this litigation without Walker's permission. Weinstock acknowledges that he signed Walker's name but argues that Walker gave him permission to sign his name. He, therefore, threatened to sue Walker for libel, slander, and abuse of process because of Walker's false statement that he did not give Weinstock permission to sign his name. The terms of this settlement agreement are extraordinary. Under this settlement agreement, Walker agrees to give his lawyer, Weinstock, 80% of a building worth $4,000,000. Not only is the amount extraordinary in settlement of a nebulous fraud/libel/slander lawsuit, arising out of a dispute over a real estate transaction, but Walker had a powerful defense. Prior to the dispute based on the fraud charges, Walker transferred property to Weinstock and Walker made a $50,000 profit. That deed was never filed. The contract where Weinstock signed Walker's name was used to transfer the property to third parties at a price which allowed Weinstock and lawyers associated with him to earn somewhere between $150,000 and $200,000. Without passing judgment on this dispute, it is clear that this scenario would have a tremendous impact on any jury, particularly when the jury would hear that Weinstock admitted that he signed Walker's name to a contract. Moreover, Weinstock sustained no measurable damages since the only evidence that Walker discussed the alleged unauthorized signature with persons other than the lawyers involved in the real estate deal is Weinstock's

claim that mutual but unidentified acquaintances called him to say that Walker had accused him of signing his name without permission. Under these circumstances, settlement of the alleged fraud/libel lawsuit for 80% of the stock in a building worth $4,000,000 is unconscionable and must be declared void, particularly since it is a contract between a lawyer and his client, a contract which requires the highest degree of scrutiny (*Greene v. Greene,* 56 N.Y.2d 86).

As mentioned before, the transfer of 20% of the stock as a fee to Weinstock, standing alone, was not so unconscionable as to be declared void. The gross unfairness surrounding the 80% transfer, coupled with another transaction where Walker makes $50,000 while lawyers associated with Weinstock make $150,000 to $200,000, taint the 20 percent transfer and it, too, must be set aside.

EQUITY

This proceeding is one in equity where the overwhelming command of the law is to do justice (*Tompers v. Bank of Am.,* 217 App.Div. 691, 694). Justice would be deeply offended if this court were to condone the following scenario. A real estate investor (Handler) finds a profitable real estate deal and brought in another investor (Walker). The investor (Handler) then finds it necessary to retain a lawyer (Weinstock) to bring a lawsuit to compel specific performance. During and subsequent to the trial, the second investor (Walker), known by all of the participants in the transaction to be a novice in real estate, signs a series of documents which purportedly transfers title to the building to the lawyer (Weinstock). And, during the four years following the trial, the investor (Handler) and

the second investor (Walker) spend over $350,000 while the lawyer (Weinstock) does not spend one dime, but now claims he is the owner of the building worth $4,000,000. That is a circumstance which gives rise to the growing public distrust of the legal profession. That circumstance is so extraordinary, so violative of the spirit of the canons of ethics, the inescapable conclusion is that even if the stock transfers were otherwise valid, they would be set aside as the consequences of overreaching and undue influence by the lawyer (Weinstock) over his client (Walker).

I find and declare that: (1) Emmerich Handler at all times throughout the existence of 4200 Avenue K Realty Corp. was the owner of any stock in said corporation; (2) Emmerich Handler was at all times the lawful owner of premises 4200 Avenue K; (3) After title to premises 4200 Avenue K was taken in the name of 4200 Avenue K Realty Corp., the subsequent transfer to 4200 Avenue K Assoc. was lawful; (4) Israel Weinstock has no claim whatsoever to premises 4200 and 4211 Avenue K located in the County of Kings.

[Portions Of Opinion Omitted For Purposes Of Publication.]

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

3339D
M/jv

Submitted – March 26, 1998

___ AD2d ___

LAWRENCE J. BRACKEN, J.P.
JOHN COPERTINO
VINCENT PIZZUTO
MYRIAM J. ALTMAN, JJ.

97-04292

Israel Weinstock, appellant, v
Esther Weinstock, respondent.

DECISION & ORDER ON MOTION

April 8, 2002

In an appeal by the plaintiff from an order of the Supreme Court, Queens County (Golar, J.), dated March 26, 1997, which was determined by decision and order of this court dated May 11, 1998, the plaintiff, an attorney, and counsel for the respondent were directed to show cause why an order should not be made and entered imposing such sanctions and costs, if any, against the plaintiff, pursuant to 22 NYCRR 130-1.1(c), as this court might deem appropriate.

On the court's own motion and on the papers filed in opposition or relation thereto, it is

ORDERED that within 20 days after service upon him of a copy of this decision and order with notice of entry, the plaintiff Israel Weinstock is directed (1) to personally pay costs in the amount of $3,000 to counsel for the defendant

Esther Weinstock, and (2) to personally pay a sanction in the amount of $10,000 to the Lawyers' Fund for Client Protection established pursuant to State Finance Law § 97-t; and it is further,

ORDERED that the Clerk of the Supreme Court, Queens County, shall enter judgment accordingly (*see,* 22 NYCRR 130-1.2).

The plaintiff, who is an attorney representing himself, pursued an appeal which was "completely without merit" (22 NYCRR 130-1.1[c][1]). We find that the plaintiff's assertion that his intent was to clear his name in no way diminishes the fact that the appeal was meritless. We believe that merit must be judged with reference to whether a particular course of litigation is or is not designed to obtain some real form of relief as a remedy for some cognizable wrong. The appeal taken by the plaintiff was completely without merit under this standard, and, in the absence of any other concrete motivation, this appeal can only have been intended to harass the defendant within the meaning of 22 NYCRR 130-1.1(c)(2), by needlessly forcing her to incur attorney's fees.

We therefore award the maximum authorized amount as a sanction for this conduct (*see,* 22 NYCRR 130-1.1), calling to mind that frivolous litigation causes a substantial waste of judicial resources to the detriment of those litigants who come to the court with real grievances. We also award costs in the sum of $3,000 in light of the proof as to the attorney's fees incurred by the defendant in opposing the appeal, payable to her counsel.

BRACKEN, J.P., COPERTINO, PIZZUTO and ALTMAN, JJ., concur.

ENTER: September 28, 1998

Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

2192q
B/mv

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
CORNELIUS J. O'BRIEN
DAVID S. RITTER
FRED T. SANTUCCI
ROBERT W. SCHMIDT, JJ.

1999-05610

DECISION & ORDER ON APPLICATION

In the Matter of Israel Weinstock, an attorney and counselor-at-law.

Grievance Committee for the Second and Eleventh Judicial Districts, petitioner; Israel Weinstock, respondent.

Application by the Grievance Committee for the Second and Eleventh Judicial Districts pursuant to Judiciary Law § 90(7) for leave to institute and prosecute a disciplinary proceeding in this court, as the petitioner, against Israel Weinstock, an attorney and counselor-at-law, who was admitted to the practice of law at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on June 22, 1960, for acts of professional misconduct alleged in the Grievance Committee's confidential memorandum dated May 26, 1999.

ORDERED that the application is granted; and it is further,

ORDERED that the Grievance Committee for the Second and Eleventh Judicial Districts is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against Israel Weinstock, based upon the acts of professional misconduct set forth in the Committee's memorandum; and it is further,

ORDERED that Robert H. Straus, Chief Counsel to the Grievance Committee for the Second and Eleventh Judicial Districts, 210 Joralemon Street, Room 1200, Brooklyn, New York 11201, is hereby appointed as attorney for the petitioner in such proceeding; and it is further,

ORDERED that the petitioner Grievance Committee shall serve on the respondent and the Special Referee, and file with this court a petition within 30 days after receipt of this order; and it is further,

ORDERED that the respondent shall serve an answer to the petition upon the petitioner, the Special Referee, and file same with this court within 10 days after his receipt of the petition; and it is further,

ORDERED that the issues raised by the petition and any answer thereto are referred to the Honorable Albert A. Blinder, a retired Judge of the Court of Claims, c/o Sexter & Warmflash, P.C., 115 Broadway, New York, NY 10006, as Special Referee to hear and report, together with his findings on the issues.

MANGANO, P.J., O'BRIEN, RITTER, SANTUCCI, and SCHMIDT, JJ., concur.

ENTER: November 16, 1999

James Edward Pelzer
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

In the Matter of Israel Weinstock, an attorney and counselor-at-law.	:	
GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,	:	PETITION *99-05610*
Petitioner,	:	
ISRAEL WEINSTOCK,	:	
Respondent.	:	

TO: THE HONORABLE PRESIDING JUSTICE AND ALL JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

The petition of the Grievance Committee for the Second and Eleventh Judicial Districts respectfully alleges that:

FIRST: By order of this Court dated and filed on the 16th day of November 1999 the Grievance Committee for the Second and Eleventh Judicial Districts (hereinafter "petitioner") was authorized to institute and prosecute a disciplinary proceeding in this Court against Israel Weinstock (hereinafter "respondent"). Further, said order appointed Robert H. Straus, Esq., as attorney for the petitioner in this proceeding.

SECOND: Said order of November 16, 1999 was duly made and filed by this Court pursuant to the authorization of Section 90 of the Judiciary Law, and Section 691.4 of the Rules Governing the Conduct of Attorneys of

the Appellate Division, Second Judicial Department (22 NYCRR § 691.4).

THIRD: Respondent was admitted to practice as an attorney and counselor-at-law in the Courts of the State of New York by the Appellate Division, Second Judicial Department on June 22, 1960.

FOURTH: Upon information and belief, at all times hereinafter mentioned, respondent either maintained an office for the practice of law, or resided in, or committed acts of professional misconduct within the Second Judicial Department.

FIFTH: Upon information and belief, respondent has been guilty of professional misconduct, as defined by Section 691.2 of the Rules Governing the Conduct of Attorneys for the Appellate Division, Second Judicial Department (22 NYCRR § 691.2) in that:

CHARGE ONE

A. Respondent engaged in conduct involving over-reaching and coercion as follows:

1. In or about 1984, respondent represented Dr. Jack Walker

[As Originally Filed]

2. In exchange for a 20% interest in the stock of 4200 Avenue K Realty Corporation, respondent agreed to prosecute an appeal from the trial court's determination.

3. At or about the same time, in an unrelated matter, Dr. Walker initiated suit against respondent in Nassau County, New York.

4. Respondent thereafter obtained from Dr. Walker the remaining 80% interest in the stock of 4200 Avenue K Realty Corporation.

5. Respondent acquired the remaining 80% interest in 4200 Avenue K Realty Corporation, after threatening to sue Dr. Walker for libel, slander and abuse of process in the Nassau County matter.

6. By reason of the foregoing, respondent has engaged in conduct adversely reflecting on his fitness to practice law, in violation of Disciplinary Rule 1-102(a)(8) of the Lawyer's Code of Professional Responsibility [22 NYCRR 1200.3], previously Disciplinary Rule 1-102(a)(6).

CHARGE TWO

1. Petitioner repeats reiterates and re-alleges all of the allegations of CHARGE ONE as if fully set forth herein.

2. By reason of the foregoing, respondent has violated Disciplinary Rule 5-103 of the Lawyer's Code of Professional Responsibility [currently 22 NYCRR 1200.3].

CHARGE THREE

A. Respondent engaged in conduct prejudicial to the administration of justice, as follows:

1. By order of the Hon. Simeon Golar, (Supreme Court, Queens County) dated March 26, 1997, respondent's motion to set aside and vacate an order dated March 27, 1989, setting aside a separation agreement entered into between Israel Weinstock and Esther Weinstock, was denied as untimely.

2. By order dated May 11, 1998, the Appellate Division, Second Judicial Department, affirmed the March 26, 1997 order.

3. Respondent's appeal from the Supreme Court's order of March 26, 1997 was without merit, and was undertaken for the purpose of harassing and maliciously injuring the opposing party.

4. By reason of the foregoing, respondent has violated Dis-

[As Originally Filed]

CHARGE FOUR

A. Respondent engaged in legal action serving merely to harass or maliciously injure another, as follows:

1. Petitioner repeats reiterates and re-alleges all of the allegations of CHARGE THREE as if fully set forth herein.

2. By reason of the foregoing, respondent has violated Disciplinary Rule 7-102(a)(1) of the Lawyer's Code of Professional Responsibility [22 NYCRR 1200.33].

WHEREFORE, petitioner prays that an order be made and entered herein, directing that the respondent, Israel Weinstock, be disciplined as an attorney and counselor-at-law, based upon the charges set forth above, and for such other action as may be contemplated by Section 90 of the Judiciary Law of the State of New York.

/s/ Mark Longo
MARK A. LONGO,
CHAIRMAN

Dated: Brooklyn, New York
December 14, 1999

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

In the Matter of Israel Weinstock, an attorney and counselor-at-law.	
GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,	VERIFICATION
Petitioner,	
ISRAEL WEINSTOCK,	
Respondent.	

MARK A. LONGO, an attorney duly admitted to practice law in the Courts of the State of New York affirms the following under the penalties of perjury:

Affirmant is chairman of the Grievance Committee for the Second and Eleventh Judicial Districts;

Affirmant has read the foregoing PETITION and knows the contents thereof and that same is true to affirmant's own knowledge, except as to those matters stated to be alleged upon information and belief, and as to those matters, affirmant believes it to be true.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

In the Matter of Israel Weinstock, an attorney and counselor-at-law.	
GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS, Petitioner,	NOTICE OF MOTION *#99-05610*
ISRAEL WEINSTOCK, Respondent.	

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of Susan Korenberg and Robert J. Saltzman, dated July 21, 2000, and the annexed Notice of Petition and Petition of Charges, dated December 14, 1999, as well as upon all the pleadings and proceedings heretofore had herein, petitioner will move this court at a Term of Motions to be held at the Courthouse, 45 Monroe Place, in the County of Kings, Borough of Brooklyn, City and State of New York, on the 25th day of August, 2000, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order:

1) declaring that no factual issues exist;

2) granting Petitioner summary judgment on the Petition;

3) directing the duly designated Referee to fix a date and time at which Respondent may be heard in mitigation or otherwise; and

4) for such other and further relief as may be just and proper under the circumstances.

Dated: Brooklyn, New York
July 21, 2000

Yours, etc.,
ROBERT H. STRAUS Attorney
for Petitioner

SUSAN KORENBERG
ROBERT J. SALTZMAN
Of Counsel

GRIEVANCE COMMITTEE
FOR THE SECOND AND
ELEVENTH JUDICIAL
DISTRICTS
210 Joralemon Street
Municipal Building, 12th Floor
Brooklyn, New York 11201

TO: Meyer, Suozzi, English & Klein, P.C.,
Attorneys for Respondent
1505 Kellum Place
Mineola, New York 11501

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

In the Matter of Israel Weinstock, an attorney and counselor-at-law.	
GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS, Petitioner,	AFFIRMATION *#99-05610*
ISRAEL WEINSTOCK, Respondent.	

SUSAN KORENBERG and ROBERT J. SALTZMAN, attorneys duly admitted to practice law in all the courts of the State of New York, affirm the following under the penalties of perjury:

1. We are of counsel to Robert H. Straus, Chief Counsel to the Grievance Committee for the Second and Eleventh Judicial Districts (hereinafter "Petitioner"), and are fully familiar with all of the relevant facts and proceedings.

2. Israel Weinstock, Esq., (hereinafter "Respondent") was admitted to practice as an attorney and counselor-at-law in the Courts of the State of New York by the Appellate Division, Second Judicial Department, on June 22, 1960.

3. Upon information and belief, at all times hereinafter mentioned, respondent either maintained an office for the practice of law, or resided in, or committed acts of professional misconduct within the second Judicial Department.

4. By Order of the Appellate Division, Second Judicial Department, dated November 16, 1999, Petitioner was authorized to institute and prosecute a disciplinary proceeding against respondent. Said Order appointed the Honorable Albert A. Blinder to "hear and report, together with his findings on the issues."

5. On or about December 14, 1999, a Notice of Petition and Petition, dated December 14, 1999, were served upon respondent via first class mail.

6. Said Petition contains four charges of professional misconduct. Each charge is predicated upon factual determinations of the Supreme Court of the State of New York, all of which have been affirmed on appeal. (Copies of the court decisions are annexed as Exhibit 1).

7. On or about January 18, 2000, respondent submitted a verified Answer to the Petition, denying the charges of professional misconduct.

8. On or about July 10, 2000, a pre-trial conference was conducted before the Hon. Albert A. Blinder. Judge Blinder adjourned the matter to permit this motion to be brought in the Appellate Division, Second Judicial Department.

A. Charges One and Two of the Petition:

9. Charges One and Two of the Petition are based upon findings from *Walker v. Weinstock*, 173 Misc. 2d I (Sup.Ct. Kings County 1997). In that case, respondent claimed a virtual 100% proprietary interest in his client's real property, located at 4200 Avenue K, Brooklyn, New York. The interest was created when Walker (the client) agreed to transfer to respondent a 20% interest in the

building in satisfaction of respondent's claim for legal fees. The remaining 80% interest was transferred to forestall respondent's threatened "nebulous fraud/liable/slander lawsuit" against Walker. *Id.* at 6.

10. With respect to the 80% transfer, the court found that:

> under these circumstances, settlement of the alleged fraud/liable lawsuit for 80% of the stock in a building worth $4,000,000 is **unconscionable and must be declared void**, particularly since it is a contract between a lawyer and

13. A review of the allegations contained in Charges One and Two of the Petition demonstrate that a *sine qua non* for the application of collateral estoppel, ie. an identity of issues, has been fully established.

B. Charges Three and Four of the Petition:

14. Similarly, the facts alleged in Charges Three and Four of the Petition, concerning respondent's protracted matrimonial action, meet the same identity of issue standard.

15. In 1996, respondent filed a motion before Judge Golar in Supreme Court, Queens County, seeking to vacate a previous Order that, *inter alia,* set aside his separation agreement[3]. Respondent's motion was based upon a claim of newly discovered evidence revealing fraud on the part of his wife and her attorneys. The motion was denied.

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[3] The separation agreement was set aside in March 1989 by J.H.O. Modugno, on the grounds that it was unconscionable.

16. On appeal, this Court affirmed Judge Golar's decision and found that "plaintiff's actions give rise to the possibility of sanctions pursuant to 22 NYCRR 130-1.1(c)." Respondent and his counsel were directed to "show cause why an order should not be made and entered imposing such sanctions and/or costs, if any, on the appellant. . . ."

17. By Order of this Court, dated September 28, 1998, respondent was directed to pay costs in the amount of $3,000 to his wife's counsel and a sanction in the amount of $10,000 to the Lawyer's Fund for Client Protection. The Court found that:

> [m]erit must be judged with reference to whether a particular course of litigation is or is not designed to obtain some real form of relief as a remedy for some cognizable wrong. The appeal taken by plaintiff was completely without merit under this standard, and, in the absence of any other concrete motivation, **this appeal can only have been intended to harass the defendant** within the meaning of 22 NYCRR 130-1.1(c)(2), by needlessly forcing her to incur attorney's fees. We therefore award the maximum authorized amount as a sanction for this conduct . . . calling to mind that **frivolous litigation causes a substantial waste of judicial resources to the detriment of those litigants who come to court with real grievances.**[4]

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[4] Respondent's motion for leave to appeal to the Court of Appeals was denied. *Weinstock v. Weinstock*, Mo. No. 1352 (Ct.App. Dec. 22, 1998). Respondent's Petition for Writ of Certiorari to the Appellate Division, Second Judicial Department, was similarly denied. *See*, *Weinstock v. Weinstock*, 119 S.Ct. 1499.

18. The issues previously determined by the courts are indistinguishable from those in the present proceeding – namely, that respondent engaged in conduct prejudicial to the administration of justice (DR 5-103) and asserted a position which was merely intended to harass or maliciously injure another (DR 7-102(a)(1)).

C. Application of the Doctrine of Collateral Estoppel in Attorney Discipline Cases:

19. The doctrine of collateral estoppel precludes a party from relitigating an issue that has previously been decided against him in order to "conserve judicial time and resources." *Matter of Capoccia,* 2000 WL 713762 (NYAD 3 Dept.), *citing Schwartz v Public Adm'r of County of Bronx,* 24 N.Y.2d 65. In the instant case, collateral estoppel would be particularly applicable, as respondent has a well-documented history of raising frivolous issues and wasting judicial resources.

20. Collateral estoppel has been widely applied in attorney disciplinary matters in this state. *See, Matter of Capoccia, infra,* (after determining that there was an identity of issue and that respondent had been afforded a full and fair opportunity to contest the determination, respondent was collaterally estopped from disputing the findings of various trial courts that he had acted frivolously); *Matter of Babigian,* 247 A.D.2d 817 (3rd Dept. 1998) (respondent was collaterally estopped from relitigating conduct for which he was sanctioned by a federal district court); *Matter of Yao,* 231 A.D.2d 346 (1st Dept. 1997) (the legal issues raised and. resolved in a breach of contract proceeding were identical to those which would otherwise have been decided in a disciplinary proceeding

and respondent had a full and fai[r] opportunity to litigate those issues); *Matter of Sylvor,* 225 A.D.2d 87 (1st Dept. 1996) (the decision in a federal court action which found that the attorney participated in securities fraud and common law fraud was given collateral estoppel effect); *Matter of Morrissey,* 217 A.D.2d 74 (1st Dept. 1995), (the doctrine of collateral estoppel was applied to the findings of a United States District Court resulting in a determination that the attorney had violated various Disciplinary Rules); *Matter of Slater,* 156 A.D.2d 89 (1st Dept. 1990) (disbarment before the Patent and Trademark Office for neglect of client matters was afforded collateral estoppel effect in attorney disciplinary proceeding).

21. In order to apply the doctrine of collateral estoppel, two requirements must be met. First, there must be "an identity of issue which has necessarily been decided in a prior action and is decisive of the present proceeding" and second, respondent must have been afforded a "full and fair opportunity to contest the determination now said to be controlling." *Capoccia* at 2000 WL 713762 (NYAD 3 Dept.). Petitioner has clearly demonstrated that the identity of issue standard has been satisfied. Moreover, the underlying mat[t]ers were fully litigated in the Supreme Court and affirmed on appeal.

D. Conclusion:

22. Since the primary factual and legal issues raised and resolved by the courts are identical to those issues which would otherwise be decided in a disciplinary proceeding, and insofar as respondent has had a full and fair opportunity to litigate those issues before courts of competent

jurisdiction, it is clear that the essential elements for invocation of collateral estoppel have been established.

WHEREFORE, it is respectfully requested that an order be granted declaring that no factual issues exist; granting Petitioner summary judgment on the Petition; directing the duly designated Referee to fix a date and time at which Respondent may be heard in mitigation or otherwise; and for such other and further relief as may be just and proper under the circumstances.

/s/ Susan Korenberg
SUSAN KORENBERG

/s/ Robert J. Saltzman
ROBERT J. SALTZMAN

Dated: Brooklyn, New York
July 21, 2000

**SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT**

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(NOT TO BE PUBLISHED)

CORNELIUS J. O'BRIEN, J.P.
DAVID S. RITTER
FRED T. SANTUCCI
SONDRA MILLER
ROBERT W. SCHMIDT, JJ.

1999-05610
In the Matter of Israel Weinstock, an attorney and counselor-at-law.
Grievance Committee for the Second and Eleventh Judicial Districts, petitioner; Israel Weinstock, respondent.

DECISION & ORDER ON MOTION

Motion by petitioner Grievance Committee for the Second and Eleventh Judicial Districts, in effect, to direct the Special Referee to fix a date and time for a hearing on the issue of mitigation only, on the ground that the respondent is collaterally estopped from contesting any factual issues in the proceeding. Cross motion by the respondent to dismiss Charges One and Two of the petition dated December 14, 1999. The respondent was admitted to the practice of law at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on June 22, 1960. By decision and order of

this court dated November 16, 1999, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against him, and the matter was referred to the Honorable Albert A. Blinder, as Special Referee, to hear and report.

Upon the papers submitted in support of the motion and the cross motion and the papers submitted in opposition thereto, it is,

ORDERED that the motion is granted; and it is further,

ORDERED that the cross motion is denied; and it is further,

ORDERED that the matter is referred to the previously-appointed Special Referee for a hearing limited solely to the issue of mitigation.

O'BRIEN, J.P., RITTER, SANTUCCI, S. MILLER and SCHMIDT, JJ., concur.

ENTER:

JAMES EDWARD PELZER
James Edward Pelzer
Clerk

SUPREME COURT, STATE OF NEW YORK APPELLATE DIVISION SECOND DEPT

I, JAMES EDWARD PELZER, Clerk of the Appellate Division of the Supreme Court. Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on Dec. 15, 2000 and that

this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Dec. 15, 2000.

December 15, 2000
/s/ James Edward Pelzer

MATTER OF WEINSTOCK, ISRAEL

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

9491B
Y/hu

___ AD2d ___

A. GAIL PRUDENTI, P.J.
DAVID S. RITTER
FRED T. SANTUCCI
MYRIAM J. ALTMAN
ROBERT W. SCHMIDT, JJ.

1999-05610

In the Matter of Israel Weinstock, an attorney and counselor-at-law.

Grievance Committee for the Second and Eleventh Judicial Districts, petitioner; Israel Weinstock, respondent.

OPINION & ORDER

DISCIPLINARY proceeding instituted by the Grievance Committee for the Second and Eleventh Judicial Districts. The respondent was admitted to the Bar on June 22, 1960, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By decision and order of this court dated November 16, 1999, the matter was referred to the Honorable Albert A. Blinder, as Special Referee, to hear and report. By subsequent decision and order dated December 15, 2000, this court granted the petitioner's motion, in effect, to direct the Special Referee to fix a date and time for a hearing on the issue of mitigation only, and the respondent was collaterally estopped from contesting any factual issues in

the proceeding, and denied the respondent's cross motion to dismiss Charges One and Two of the petition. By further decision and order of this court dated April 24, 2001, the respondent's application for leave to open the hearing to the public was granted. Finally, by decision and order of this court dated June 8, 2001, the respondent's motion, inter alia, to adjourn the hearing was denied.

Diana Maxfield Kearse, Brooklyn, N.Y. (Susan Korenberg and Robert J. Saltzman of counsel), for petitioner.

Israel Weinstock, Belle Harbor, N.Y., respondent pro se.

PER CURIAM. The respondent was served with a petition containing four charges of professional misconduct. By decision and order of this court dated December 15, 2000, he was granted a hearing solely on mitigation, and was determined to be collaterally estopped from contesting any factual issues at the hearing. After the hearing on the issue of mitigation, the Special Referee sustained all four charges. The petitioner now moves to confirm the Special Referee's report. The respondent cross-moves to disaffirm the Special Referee's report, to dismiss the petition, and to refer the matter to the Appellate Division, Third or Fourth Judicial Department, to avoid the appearance of impropriety. Alternatively, he seeks a 60-day stay of any discipline imposed in order to seek leave to appeal to the Court of Appeals.

Charge One alleged that the respondent engaged in conduct involving overreaching and coercion that adversely reflects on his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102(a)(8) (now 7) (22 NYCRR 1200.3[a][8, now 7]).

In 1984 the respondent represented Dr. Jack Walker, a principal of 4200 Avenue K Realty Corporation, in connection with an action for specific performance involving property located at 4200 Avenue K, in Brooklyn. In exchange for a 20% interest in the stock of 4200 Avenue K Realty Corporation, the respondent agreed to prosecute an appeal from an order. At about the same time, in an unrelated matter, Dr. Walker commenced an action against the respondent in Nassau County. The respondent subsequently obtained from Dr. Walker the remaining 80% interest in the stock of 4200 Avenue K Realty Corporation by threatening to sue him for libel, slander, and abuse of process in the Nassau County matter.

Charge Two alleged that based on the foregoing factual allegations, the respondent improperly acquired a proprietary interest in the subject matter of the litigation he was conducting for a client, in violation of Code of Professional Responsibility DR 5-103 (22 NYCRR 1200.3).

Charge Three alleged that the respondent engaged in conduct prejudicial to the administration of justice, in violation of Code of Professional Responsibility DR 1-102(a)(5) (22 NYCRR 1200.3[a][5]).

By order dated March 26, 1997, the Supreme Court, Queens County, denied the respondent's motion to vacate an order of the same court dated March 27, 1989, which set aside a separation agreement entered into between the respondent and Esther Weinstock. By decision and order of this court, dated May 11, 1998, the order of the Supreme Court was affirmed (*Weinstock v Weinstock*, 250 AD2d 671). The respondent's appeal from the Supreme Court's order was without merit and was undertaken for the

purpose of harassing and maliciously injuring the opposing party (*see Weinstock v Weinstock, supra*).

Charge Four alleged that, based on the foregoing factual allegations, the respondent engaged in legal action merely to harass or maliciously injury another, in violation of Code of Professional Responsibility DR 7-102(a)(1) (22 NYCRR 1200.33[a][1]).

Based on the decision and order of this court dated December 15, 2000, and the evidence adduced at the hearing, all four charges were properly sustained by the Special Referee.

In determining the appropriate measure of discipline to impose, the court has considered the respondent's stubborn refusal to acknowledge his misconduct and his attempts to blame everyone else, including the Grievance Committee and this court, for the situation in which he now finds himself. He is guilty of serious professional misconduct involving harassment, coercion, and overreaching. Despite the fact that he has no prior disciplinary history, his disbarment is warranted.

PRUDENTI, P.J., RITTER, SANTUCCI, ALTMAN and SCHMIDT, JJ., concur.

ORDERED that the petitioner's. motion to confirm the Special Referee's report is granted; and it is further,

ORDERED that the respondent's. cross motion, inter alia, to disaffirm the Special Referee's. report is denied in its entirety; and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent, Israel Weinstock, is

disbarred. and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that the respondent shall comply with this court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, Israel Weinstock is commanded to desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

ENTER: April 8, 2002

JAMES EDWARD PELZER
James Edward Pelzer
Clerk

SUPREME COURT, STATE
OF NEW YORK
APPELLATE DIVISION
SECOND DEPT

I, JAMES EDWARD PELZER, Clerk of the Appellate Division of the Supreme Court. Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on APR 8 – 2002 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have here unto set my hand and affixed the seal of this Court on APR 9 – 2002.

/s/ James Edward Pelzer

In the Matter of Israel **Weinstock**,
An Attorney and Counselor-At-Law.

Mo. No. 459

COURT OF APPEALS OF NEW YORK

98 N.Y.2d 604; 773 N.E.2d 1016;
746 N.Y.S.2d 278; 2002 N.Y. LEXIS 1463

June 4, 2002, Decided

OPINION: Motion for leave to appeal denied. Motion for a stay dismissed as academic.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of	
Israel Weinstock 140-06 Rockaway Beach Boulevard Belle Harbor, NY 11694, Respondent	M-2-238 ORDER TO SHOW CAUSE

By Order dated April 8, 2002 of the Supreme Court of the State of New York, Appellate Division, Second Department, respondent Israel Weinstock, a member of the bar of this Court, was removed from the roll of practicing attorneys by the State of New York. Accordingly, pursuant to S.D.N.Y. Local Civil Rule 1.5(d)(1) governing reciprocal discipline, the respondent Israel Weinstock must show cause, by affidavit or other written submission why the attached order, striking his name from the roll of practicing attorneys of this Court, should not take effect by its terms on January 3, 2005. Any such submission should be directed to the Honorable Jed S. Rakoff, Chair of the Committee on Grievances, S.D.N.Y., and must be filed with the Clerk of the Court within 20 days from the date hereof, *i.e.*, by December 28, 2004, to stay the effectiveness of the attached Order.

SO ORDERED.

/s/ Jed S. Rakoff
JED S. RAKOFF
Chair, Committee on
Grievances S.D.N.Y.

Dated: New York, New York
December 8, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In the Matter of
ISRAEL WEINSTOCK,

Respondent.

No. M-2-238

Judge Jed S. Rakoff

- x

On Order to Show Cause Before the Committee on Grievances

RESPONDENT ISRAEL WEINSTOCK'S RESPONSE TO ORDER TO [S]HOW CAUSE WHY HIS NAME SHOULD NOT BE STRICKEN FROM THE ROLL OF PRACTICING ATTORNEYS OF THIS COURT

In response to the Order to Show Cause entered on December 8, 2004 by the Committee on Grievances Respondent Israel Weinstock hereby objects to his name being stricken from the roll of practicing attorneys of this Court based on an order of disbarment entered on April 8, 2002 by the New York Supreme Court, Appellate Division, Second Judicial Department.

I. REASONS FOR REPUDIATING RECIPROCAL DISBARMENT

As substance constitutional reasons why Respondent should not be stricken from the roll of practicing attorneys of this Court attorney Israel Weinstock hereby declares under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. The New York disbarment order is void and therefore not entitled to judicial recognition or comity as due process requires findings of fact supported by clear and convincing evidence rather then by the mere preponderance of the evidence in attorney disciplinary proceedings for *in terrorem* allegations of professional misconduct in order to support reciprocal disbarment of a member of this Court based upon antecedent state court bar disciplinary proceedings;

2. The New York disbarment order is void as wanting in due process and fundamental fairness for absence of just procedures, a meaningful opportunity to be heard and/or for a conscious shocking unconstitutional infirmity of proof of professional misconduct;

3. The New York disbarment order is void as wanting in procedural and substantive due process as Respondent was denied a full and fair opportunity to present evidence that:

a. the final judgment rendered on March 13, 1997 in *Walker v. Weinstock*, 658 N.Y.S. 2d 167 (N.Y Sup Ct. *Kings* County 1997) which formed the ingredient of Respondent's summary disbarment was void under the Due Process Clause of the Fourteenth Amendment as the product of extrinsic fraud, judicial collusion, and an "infirmity of proof". *Selling v. Radford*, 243 U.S. 46, 50-51(1917); *In re Jacobs*, 44 F.3d 84, 88 (2d Cir. 1994) *In re Edelstein*, 214 F.3d 127,131(2d Cir. 2000); *In the Matter of Caranchini*, 160 F.3d 420, 424-425 (8th Cir. 1998); *In re Kramer*, 193 F.3d 1131,1132 (9th Cir. 1999); *In Re Thies*, 662 F.2d 771, 772 (D.C. Cir. 1980); *In Re Jones*, 506 F.2d 527, 528-29 (8th Cir. 1974);

b. the disciplinary charges against Respondent were brought for improper retaliatory motive as a vehicle of oppression, solely to impair a federal criminal investigation against bar complainant triggered by United States District Judge Robert Patterson of the Southern District of New York in *MLE Realty and FDIC v. Handler*, No. 93 civ. 0668(RPP) against bar complainant denying Respondent procedural and substantive due process under the Fourteenth Amendment of the United States Constitution. *In re Quarles*, 158 U.S. 532(1895); *Daniels v. Williams*, 474 U.S. 327, 329-333 (1986); *In re United States*, 565 F.2d 19, 22 (2d Cir. 1977); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1962); *United States v. Toombs*, 497 F.2d 88, 90 n.1 (5th Cir. 1974);

c. on August 4, 1998 New York bar counsel Robert Saltzman in the presence of New York bar counsel Susan Korenberg engaged in gross criminal misconduct under color of law: extortion, obstruction of justice and tampering of a material witness in a pending federal criminal investigation by urging under color of law during the pre-filing investigative stage of the bar proceeding that Respondent withdraw civil claims against the bar complainants and their former attorneys, and in exchange Saltzman could make the complainants bar charges "go away", collusive conduct by state actors jointly engaged in a corrupt purpose in concert with and for the private unlawful benefit of non-state actors with a pecuniary interest and a personal stake in the Respondent's disbarment. *Dennis v. Sparks*, 449 U.S. 24, 27-28(1980); *Rounseville v. Zahl*, 13 F.3d 635, 633(2d Cir 1994); *Catz v. Chalker*, 142 F.3d 279 fn. 8 (6th Cir. 1998).

d. the egregious departures from established and venerable modes of procedure and process in the New

York bar proceedings, including the withholding of a "confidential memorandum" filed by bar counsel with the New York Supreme Court, Appellate Division which triggered the bar charges, constitute a denial of fundamental fairness and a meaningful opportunity to be heard, demonstrating wanton acts of conscience shocking retaliatory conduct by bar counsel for corrupt purpose with the guiding hand of other officers of the rendering state court, aiding and abetting the subornation of perjury. Impermissible retaliatory conduct "used for purposes of oppression", *Daniels v. Williams*, 474 U.S. 327, 331 (1986) to impair a federal criminal investigation denying Respondent procedural and substantive due process under the Fourteenth Amendment of the United States Constitution, *In re Quarles*, 158 U.S. 532 (1895); state action instituted by New York bar counsel not in good faith in furtherance of the public interest – significantly, the disbarment took place 17 years after the acts complained of, 5 years after the bar complaints were filed against him, and despite the admittedly unblemished record of the Respondent over a 42 year career, the disbarment was made effective immediately so as not to give the within Respondent an opportunity to wind up his affairs and thus paralyze his ability to pursue his pending civil claims against bar complainants and their attorneys and others acting in concert with them, but solely as a vehicle of oppression to shield, benefit, protect and advance private parties and narrow personal and legal interests by resort to the disbarment sword by officers of the rendering state court; procedural and process irregularities, fraudulent concealment of core documents provided to the rendering court; malicious and selective prosecution in disregard of express public policy of staying its hand while related civil proceeding[s] are pending, abuse of process, extrinsic fraud, obstruction of

justice and witness tampering and extor[t]ion combined, making a farce and mockery of Respondent's right to procedural and substantive due process under the Fourteenth Amendment of the United States Constitution. That the intent was to paralyze the Respondent in his professional activities was further demonstrated by the fact that the Court refused to stay it's Order of Disbarment for a 60 day period so as to give the within Respondent an opportunity to appeal to the state's highest court, although the allegedly wrongful acts complained of had occurred 17 years earlier and bar complainants did not complain until 12 years after the alleged acts and corrupt New York bar counsel did not act upon same until after United States District judge Robert Patterson referred the bar complainant matter to the Office of the United States Attorney for a federal criminal investigation.

II. RESPONDENT IS ENTITLED TO AN EVIDENTIARY HEARING

In support of Respondent Israel Weinstock's claim that he is entitled to an evidentiary hearing to establish why reciprocal disbarment should not be imposed by this Court, Respondent has assembled the following pleadings and documents in aid of the Committee on Grievances' intrinsic consideration of the record of the New York disbarment proceedings required by *Selling v. Radford*, 243 U.S. 46, 51 (1917):

1. Respondent Israel Weinstock's *Verified Application for Reinstatement and Restoration to Attorney Rolls of the Supreme Court* filed on December 3, 2004 in *In Re the Matter of the Disbarment of Israel Weinstock*, No. 2333.

2. Respondent Israel Weinstock's *Declaration in Support of Response To Order to Show Cause Why his Name Should Not Be Stricken from the Roll of Practicing Attorneys of the United States District Court for the Southern District of New York* filed herein in *In the Matter of Israel Weinstock*, No. M-2-238.

3. Respondent Israel Weinstock's *Verified Motion Requesting Referral to Committee on Admissions and Grievances for the Second Circuit Under Local Rule 46(h)(2)* filed on December 9, 2004 in *Israel Weinstock v. Committee on Grievances of the United States District for the Eastern District of New York and Grievance Committee of the Second and Eleventh Judicial Districts*, No. 04-2735-cv.

4. Respondent Israel Weinstock's *Verified Complaint* filed on January 26, 2004 in *Israel Weinstock v. Grievance Committee of the Second and Eleventh Judicial Districts and the Committee on Grievances of the United States District Court for the Eastern District of New York*, No. CV 04-0296 (E.D.N.Y.).

5. Respondent Israel Weinstock's *Documentary Appendix Volume I* filed on January 26, 2004 in *Israel Weinstock v. Grievance Committee of the Second and Eleventh Judicial Districts and the Committee on Grievances of the United States District Court for the Eastern District of New York* No. CV 04-0296 (E.D.N.Y.).

6. Respondent Israel Weinstock's *Documentary Appendix Volume II* filed on January 26, 2004 in *Israel Weinstock v. Grievance Committee of the Second and Eleventh Judicial Districts and the Committee on Grievances of the United States District Court for the Eastern District of New York*, No. CV 04-0296 (E.D.N.Y.).

7. Volumes 1-5 of the Record of New York Disbarment Proceeding filed with the New York Court of Appeals on April 17, 2002 in *In the Matter of Israel Weinstock*, No. 1999-05610.

Respondent objects to his name being stricken from the roll of practicing attorneys of this Court based on an order of disbarment entered on April 8, 2002 by the New York Supreme Court, Appellate Division, Second Judicial Department. Having established good cause Respondent Israel Weinstock demands an evidentiary hearing, with compulsory process before the Committee on Grievances followed by the entry of express findings of fact and conclusions of law that Respondent's New York disbarment proceedings made a farce and mockery of due process and that the order of disbarment entered on April 8, 2002 by the New York Supreme Court, Appellate Division, Second judicial Department is void as wanting in due process and fundamental fairness and therefore not entitled to reciprocal recognition by any judicial tribunal under 28 U.S.C. § 1738 as the mere preponderance of the evidence standard of proof employed by the New York disciplinary apparatus for professional misconduct under *In re Capoccia*, 453 N.E. 2d 497 (N.Y.1983) is clearly unconstitutional. *See*, Respondent Israel Weinstock's *Verified Application for Reinstatement and Restoration to Attorney Rolls of the Supreme Court* filed on December 3, 2004 in *In Re the Matter of the Disbarment of Israel Weinstock*, No. 2333 at pages 5-42 filed with this Court. Since at least 1939 this Court has required findings of professional misconduct supported by clear and convincing evidence before imposition of discipline. *In Re Levy*, 30 F. Supp. 317, 331

(S.D.N.Y. 1939). *See also*, S.D.N.Y/E.D.N.Y. Local Rule 1.5(b)[1].

The record before the Court establishes *prima facia* evidence that the New York bar proceedings were brought for impermissible retaliatory and corrupt purpose. These allegations of misconduct by New York bar counsel and others if true would render the New York disbarment order void as wanting in due process and fundamental fairness for absence of just procedures, a meaningful opportunity to be heard and/or for a conscious shocking unconstitutional infirmity of proof of professional misconduct. *See*, Respondent Israel Weinstock's *Declaration in Support of Response To Order to Show Cause Why his Name Should Not Be Stricken from the Roll of Practicing Attorneys of the United States District Court for the Southern District of New York* filed herein in *In the Matter of Israel Weinstock*, No. M-2-238.

Respondent is on professional death row – banging the bars and this presentment is nothing short of a constitutional collateral attack on the New York disbarment order under *Barrows v. Hunton*, 99 U.S. 80, 83(1878); *Griffith v. Bank of New* York, 147 F.2d 899, 904 (2nd Cir. 1941) as wanting in due process and fundamental fairness. Respondent demands a meaningful opportunity to be heard by way of compelled testimony under oath, documentary evidence and confrontation of witnesses in a public hearing to establish by clear and convincing evidence the horrific *prima facia* inconvenient facts that warrant

[1] The United States Court of Appeals for the Second Circuit has yet to adopt a standard of proof as it appears the Committee of Admissions and Grievances has never had occasion to conduct an evidentiary hearing. *See*, Second Cir. Local Rule 46.

plenary review by this tribunal – allegations of prosecutorial misconduct by New York bar counsel, fiduciaries and guardians of professional norms and standards, and other officers of the New York bar who for corrupt and retaliatory purpose used the disbarment proceedings as a sword to shut down, discredit and tamper with a complaining winless in a federal criminal investigation for fraud upon the United States against the Federal Deposit Insurance Corporation triggered in 1999 by United States District Judge Robert P. Patterson Jr. against a corrupt judgment-debtor based on evidence developed in his courtroom *in MLE Realty and Federal Deposit Insurance Corp. v. Handler*, No. 93 civ. 0668(RPP) (S.D.N.Y.), and to leverage and coerce a voluntary dismissal of Respondent Weinstock's civil suits for damages against bar complainants and several attorneys that was commenced years before the filing of the bar complaint, and in consideration for voluntary dismiss: New York bar counsel Saltzman told Respondent on August 8, 1998 that he would make the bar charges brought by complainants "go away".

As if an officer of the Court could *quid pro quo* settle allegations of professional misconduct in bar proceeding for a private chose of action against bar complainants, on September 8, 1998, Respondent wrote New York bar counsel and standing on principle told them to shove their "go away" offer and unequivocally told these fiduciaries of professional norms and standards and agents for the Grievance Committee for the Second and Eleventh judicial Districts that under no circumstances would Respondent "withdraw" his civil claims against bar complainants and their attorneys in exchange for "go away" dismissal of the bar charges that the Grievance Committee was investigating. The 7 page single-spaced letter corroborates the *prima*

facia evidence of obstruction of justice by New York bar counsel, the bar complainants and their attorneys. Here is a short sampling:

> Dear Ms. Korenberg and Mr. Saltzman:
>
> After the hearing with reference to the above complaints [Handler and Walker], you asked me *whether it was worth it for me to pursue my claims in light of the tremendous cost to me in both health and finances.* I most certainly appreciate your concern and understand your question. I responded that there was more involved in this matter than my case. The viability of our judicial system and the public's reliance thereon is what is at stake.
>
> I wish to demonstrate the gravity and magnitude (as well as brazenness and fearlessness) of the perjury, lies, and deceit that I have had to deal with in trying to get my property back from Cleary Gottlieb with whom I had entrusted it in escrow. I am setting forth herein a sampling of the Jack Walker testimony and activities with respect to his dealings with the courts and with me. It appears that the perpetrators are and have been absolutely convinced that anarchy reigns supreme in our judicial system. They know how to derail it; that they can actually use the judicial system to commit fraud.

Prior to August 1998 Respondent was a whistleblower in judge Patterson's court and cooperating in a federal criminal investigation for fraud against the Federal Deposit Insurance Corporation by a corrupt judgment-debtor, Respondent's future bar complainant. And it is the fundamental right of every citizen of the United States and the corresponding professional obligation and

common law duty of every officer of this Court to put in motion the course of justice to see that the laws are faithfully executed, by reporting reasonable probable cause violations of the criminal laws of the United States relating to fraud upon the United States and in Judge Patterson's court, and it is also the corresponding obligation of the Committee on Grievances to see that this right and duty may be exercised freely, and to protect its citizens from harm. *In re Quarles*, 158 U.S. 532, 536 (1895); *United States v. Pacelli*, 491 F.2d 1108, 1113 (2nd Cir. 1973).

Respondent's New York bar proceedings are retaliatory and the product of corrupt influence aided by "revolving door" bar counsel, among others, that routinely practice, lobby, and navigate New York's disciplinary apparatus as a "specialty", and is directly traceable to Respondent, a judgment-creditor seeking to enforce a money judgment entered against the bar complainant in Judge Patterson's court. A New York state trial court had originally entered judgment against the bar complainant on behalf [of] a New York bank in 1992. Later, the bank was declared [in] insolvent and the Federal Deposit Insurance Corporation was appointed as receiver. On November 17, 1993, Judge Patterson adopted the state court judgment and entered judgment against the bar complainant and for the FDIC in the amount of $492,370.05. That judgment was summarily affirmed on appeal. *FDIC v. Handler*, 57 F.3d 1063 (2nd Cir. 1995). The judgment was assigned severel times. The FDIC first assigned it to a private party, who subsequently assigned it to Respondent, who then assigned it to MLE. *MLE Realty and FDIC v. Handler*, 192 F.3d 259(2d Cir. 1999), *on remand*, 2000 U.S. Dist. LEXIS (S.D.N.Y. 2000).

In aid of [illegible]e proceedings Respondent has assembled for the Committee's review more than 1500 pages of relevant documents and pleadings in support of his claim that the New York disbarment proceeding was wanting in due process and fundamental fairness. A comprehensive and critical examination of those documents is a daunting and time consuming task for members of the Committee on Grievances. Respondent is mindful that "judges are not like pigs, who should be made to hunt for truffles buried in briefs", *United States v. Dunkel*, 927 F. 2d 955, 956 (7th Cir. 1991). Therefore Respondent suggests that the Committee begin its intrinsic consideration of the New York disbarment proceeding by first reviewing:

1. Respondent's *Verified Application for Reinstatement and Restoration to Attorney Rolls of the Supreme Court* filed on December 3, 2004 in *In Re the Matter of the Disbarment of Israel Weinstock*, No. 2333;

2. Respondent's *Declaration in Support of Response To Order to Show Cause Why his Name Should Not Be Stricken from the Roll of Practicing Attorneys of the United States District Court for the Southern of District of New York* filed herein in *In the Matter of Israel Weinstock*, No. M-2-238 filed herein;

3. Respondent's Verified Complaint filed on January 26, 2004 in *Israel Weinstock v. Grievance Committee of the Second and Eleventh Judicial Districts and the Committee on Grievances of the United States District Court for the Eastern District of New York*, No. CV 04-0296 (E.D.N.Y.) and Volumes I & II of Documentary Appendix annotated to the Verified Complaint;

In *In Re Jacobs*, 44 F.3d 84, 90-91 (2nd Cir. 1994) the Second Circuit held that an attorney is entitled to an

evidentiary hearing in a reciprocal federal disbarment proceeding upon a showing that he was denied a full and fair opportunity to present evidence in the state disbarment proceeding, or where the record of the state disbarment proceeding was incomplete, or where the attorney has demonstrated new evidence such as a "confidential memorandum" submitted to the New York Supreme Court Appellate Division by New York bar counsel that Respondent has never seen that would shed significant light on the constitutional infirmities alleged here, as well as evidence that resulted in a jury verdict rendered on July 2, 2002, 4 weeks after Respondent's disbarment, in *Handler & Roth v. Weinstock* in the Supreme Court for Kings County, Index No. 42682197, finding that Handler and his attorneys had "swindled" Respondent out of his interest in the corporate ownership of the apartment complex and that Handler and his associates then had used the Courts to legitimize their crimes.[2] The very same apartment complex that was the subject of Respondent's so called "overreaching" finding by Justice Douglas on March 13, 1997 that resulted in Respondent's New York disbarment.

These grave allegations are serious indictments regarding quasi-criminal conduct committed by several New York bar officials and other officers of the Court which require very specific and methodical findings by a fact-finder because ultimately these proceedings are most certainly not about a law license – a mere "property

[2] Respondent is in the process of assembling for the Committee's review the trial transcripts of the *Handler* libel action as well as the transcripts of evidentiary proceedings before Judge Patterson in *MLE & FDIC v. Handler.*

interest"[3], unconstitutionally disgorged by corrupt New York bar counsel and other officers of the Court – "property" lost after 42 years of honorable practice as a member of a noble profession – no, these proceedings are about my "*reputation, reputation, reputation! 0, I have lost my reputation! I have lost the immortal part of myself and what remains is bestial*".[4] And that is why the "*right to exercise* [the privilege to practice law] *ought not to be lightly or capriciously taken*" from me or any other officer of the Court! *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824) (Emphasis added).

III. CONCLUSION

For the foregoing reasons based on fundamental fairness, Respondent's declaration in support and the initial record assembled herein, this Court must deny federal reciprocal disbarment as a matter of law based on the unconstitutionality of New York's application of the preponderance of the evidence standard in attorney disciplinary proceedings. *See,* constitutional argument presented in Respondent's *Verified Application for Reinstatement and Restoration to Attorney Rolls of the Supreme Court* filed on December 3, 2004 in *In Re the Matter of the Disbarment of Israel Weinstock*, No. 2333.

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[3] "The interest here at stake does not come within that category; the suspension is of appellant's privilege to practice law, *a not insignificant privilege,* but one which, once extended, is more nearly to be classified as a *property interest*, as to which the higher standard of proof has not been required". *In re Cappoccia*, 453 N.E. 2d 497, 498-99 (N.Y. 1983).

[4] Cassio, in *Othello*, Act 2, Scene 3-William Shakespeare

In the alternative, should this Committee uphold the constitutionality of New York's application of the mere preponderance of the evidence standard in disciplinary proceedings then the outcome before the Committee will turn on the horrific quasi-criminal conduct alleged herein, conduct that made a farce and mockery of the New York bar proceedings, a full and complete documentary record that would be assembled for the Committee that raise unresolved relevant and material issues of fact, which if found true by a fact finder would inform the outcome of these proceedings in a light most favorable to the Respondent. It, is clear that Respondent has amply demonstrated the good cause necessary for an evidentiary hearing before the Committee under *In* Re *Jacobs* in cases of federal reciprocal disbarment. Accordingly, the Committee on Grievances should set this matter down promptly for an evidentiary hearing conducted in public as there are unresolved material issues of fact that would be vigorously disputed by the alleged wrongdoers – officers of the Court. *See, In re Palmisano*, 70 F.3d 483, 485(7th Cir. 1995); *In re Bird*, 353 F. 3d 636, 638 (8th Cir. 2003) (material issues of fact unresolved in state disciplinary proceedings triggers evidentiary hearing in federal reciprocal disbarment proceedings).[5]

Finally, in the interest of judicial economy Respondent suggests that the Committee appoint a special judicial master to conduct an evidentiary hearing and render express findings of facts and conclusions of law in a report

[5] The ABA Model Federal Rules of Disciplinary Enforcement provides in relevant part: "the district court shall conduct a hearing if the accused attorney wishes to dispute facts or to be heard in mitigation."

and recommendation to the Committee regarding Respondent's right to continued status as a member in good standing of the roll of practicing attorneys of this Court. The outcome of these bar proceedings will turn on complex facts, the credibility of adverse witnesses, and matters of issue preclusion relating back to prior judicial findings adjudicated by Judge Patterson regarding the bar complainant, a New York attorney, *MLE Realty and FDIC v. Handler*, 192 F.3d 259 (2d Cir. 1999), *on remand*, 2000 U.S. Dist. LEXIS (S.D.N.Y. 2000), that are inextricably intertwined with the retaliatory conduct claim asserted here. The Committee should request the assignment of Judge Patterson to serve as a special judicial master as a related case as the retaliatory conduct and obstruction of justice allegations, *In re Quarles*, 158 U.S. 532 (1895); *United States v. Pacelli*, 491 F. 2d 1108, 1113 (2nd Cir. 1973) arise under and are directly traceable to Judge Patterson's criminal referral of the bar complainant to the United States Attorney for the Southern Distri of New York for investigation and possible prosecution based on evidence of perjury and fraud committed in his courtroom that Respondent exposed by clear and convincing evidence during debt collection proceedings.

Respectfully submitted

/s/ Israel Weinstock

Israel Weinstock
140-06 Rockaway Beach Blvd.
Belle Harbor, New York 11694
(718) 318-1000
Respondent

Executed in Belle Harbor, New York this 27st day of December, 2004 under penalty of perjury pursuant to 28 U.S.C. § 1746.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF **ISRAEL WEINSTOCK,** **An Attorney**	**ORDER OF DISBARMENT** (Filed Oct. 17, 2005) Pursuant to Local Rule 46(f)(1) Docket No.: 05-8302

An order having been entered on April 8, 2002, in the **Supreme Court of the State of New York, Appellate Division, Second Judicial Department**, disbarring **ISRAEL WEINSTOCK** from the practice of law before that Court,

IT IS ORDERED, pursuant to Rule 46(f)(1) of the Rules of this Court, supplementing the Federal Rules of Appellate Procedure, that **ISRAEL WEINSTOCK**, who was admitted to practice as an attorney before this Court on **October 4, 1993**, is disbarred from the practice of law before this Court upon such terms and conditions as set forth in the above mentioned order of the **Supreme Court of the State of New York, Appellate Division, Second Judicial Department** and until further order of this Court, and that this order shall become effective 24 days after the date of service upon said attorney unless sooner modified or stayed.

FOR THE COURT:

/s/ Roseann B. MacKechnie
ROSEANN B. MacKECHNIE
CLERK OF COURT

Dated: October 17, 2005
New York, New York

UNITED STATES COURT APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF ISRAEL, WEINSTOCK,
An Attorney,

RESPONDENT. **No. 05-8302**

On Original Disciplinary Jurisdiction
Arising Under Rule 46(c) Of The Federal Rules
of Appellate Procedure And Local Rule (f)(1)

RESPONDENT ATTORNEY ISRAEL WEINSTOCK'S
MOTION UNDER LOCAL RULE 46(f)(2)
TO PERMANENTLY REVOKE THIS COURT'S
ORDER OF FEDERAL RECIPROCAL DISBARMENT
ENTERED ON OCTOBER 17, 2005
AND FOR FURTHER RELIEF

On October 17, 2005 this Court issued an order of federal reciprocal disbarment pursuant to Local Rule 46(F) striking Respondent Attorney Israel Weinstock from the attorney rolls of this Court based solely on an order entered on April 8, 2002 by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. This timely motion to revoke this Court's order of federal reciprocal disbarment follows.

Respondent is entitled to a full evidentiary plenary hearing before this Court under Local Rule 46(f)(4) on the disputed factual issues enumerated below as Respondent was denied as a matter of New York law, *In re Capoccia*, 209 N.Y. 2d 640 (N.Y. App. 2000), any and all opportunity *to* present evidence in his defense in his New York disbarment

proceeding regarding the allegations of professional misconduct. *In re Jacobs,* 44 F.3d 84, 88-90 (2d Cir. 1994); *In re Williams,* 398 F.3d 116, 119 (1st Cir. 2005); *In Re Palmisano,* 70 F.3d 483, 485 (7th Cir. 1995); *In Re Bird,* 353 F.3d 636, 638 (8th Cir. 2000) (material issues of fact left unresolved in state disciplinary proceeding triggers plenary evidentiary hearing on those issues).

Wherefore on the legal issues and evidence to be presented at a full plenary evidentiary hearing to be conducted by a special master appointed by this Court under its original jurisdiction and inherent power to discipline its attorneys members under Rule 46(f)(4) of the Federal Rules of Appellate Procedure, regarding disputed material issues of fact and a corresponding intrinsic review of the New York disbarment record by this Court required under *Selling v. Radford,* 243 U.S. 46, 51 (1917) Respondent will establish by clear and convincing evidence at an evidentiary hearing that:

(1) The New York disbarment order is void as the New York Supreme Court, Appellate Division, Second Judicial Department acted in a manner inconsistent with due process and fundamental fairness for absence of fair procedures and a full and fair opportunity to be heard. *Barrows v. Hunton,* 99 U.S. 80, 83 (1878). *Griffith v. Bank of New York,* 147 F.2d 899, 904 (2d Cir.1941); *Beller v. Tyler,* 120 F.3d 21, 23 (2d Cir. 2005). Nonetheless, this Court still has its own an independent obligation under Local Rule 46(h)(2) to refer this matter to the Committee on Admissions and Grievances to conduct its own separate disciplinary proceeding based on the underlying New York bar charges if supported by clear and convincing proof of professional misconduct. *Ex Parte Wall,* 107 U.S. 265, 288 (1883); *Bhandari v. Advocates Committee,* 3 All Eng, Reports 742, 744 (Privy Council 1956).

(2) In attorney disciplinary proceedings, due process requires evidence of professional misconduct supported by clear and convincing proof, thereby prohibiting reciprocal disbarment in federal court based on an underlying antecedent New York disbarment order grounded on the mere preponderance of the evidence. *Ex Parte Wall,* 107 U.S. 265, 288 (1883); *Bhandari v. Advocates Committee,* 3 All Eng, Reports 742, 744 (Privy Council 1956).

(3) The application of the mere preponderance of the evidence standard applied to attorney disciplinary proceedings constitutes an unconstitutional infirmity of proof of professional misconduct resulting in a grave injustice. *Selling v. Radford,* 243 U.S. 46, 51 (1917).

(4) Due process prohibits the summary disbarment of an attorney as a matter of New York law *In re Capoccia,* 209 N.Y. 2d 640 (N.Y. App. 2000 by the offensive use of collateral estoppel grounded solely on gratuitous, *obiter dictum* comment contained in a New York state trial judge's published opinion in an antecedent civil suit subsequently adopted by the New York disbarment court as established fact of professional misconduct without a plenary evidentiary hearing. *Haring v. Proisise,* 462 U.S. 306, 313 (1983); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327 (1979); *Stone v. Williams,* 970 F.2d 1043, 1060 (2d Cir. 1992).

(5) Due process prohibits the summary adoption by this Court of the New York state trial judge's *obiter dictum* in federal reciprocal disbarment proceedings where the opinion was given collateral estoppel effect as a matter of New York law under *In re Capoccia,* 209 N.Y. 2d 640 (N.Y. App. 2000) in the prior New York disbarment proceeding rendered on anything less than clear and convincing proof of professional

misconduct. *Selling v. Radford,* 243 U.S. 46, 51 (1917).

(6) The absence of uniformity among the several states within this Circuit regarding the standard of proof to applied in federal reciprocal disbarment proceedings violates Article IV, § 2 of the Constitution which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. *Paul v. Virginia,* 75 U.S. 168, 180 (1896); *Austin v. New Hampshire,* 420 U.S. 656, 660-662 (1975); *Connecticut v. Crotty,* 346 F.3d 84, 94 (2d Cir. 2003).

(7) Members of the bar of this Court from New York enjoy the equal protection under the Fifth Amendment regarding the standard of proof to be applied in federal reciprocal disbarment proceedings in this Court enjoyed by members from Connecticut and Vermont. *Reed v. Reed,* 404 U.S. 71, 75-76 (1971); *Eisenstadt v. Baird,* 405 U.S. 438, 447-448 (1972); *Person v. Association of the Bar of the City of New York,* 554 F.2d 534, 538-539 (2d Cir. 1977).

(8) The submission of a "confidential memorandum" by New York bar counsel to the New York Supreme Court, Appellate Division, Second Judicial Department in support of bar charges constitutes a violation of substantive and procedural due process in the underlying New York disbarment proceeding. This Court and the Respondent are entitled to view that submission under this Court's obligation to undertake an intrinsic review of the New York disbarment record before rendering a judgment herein. *Selling v. Radford,* 243 U.S. 46, 51 (1917).

(9) Due process requires that there can be "no tiunt of compromise" by New York bar counsel in any attorney disbarment proceedings alleging professional

misconduct acting under color of law on behalf of the bar complainants. Because the retention of a fiduciary's law license "is a statutory right undergirded by public policy considerations" regarding core issues of trust, honesty and integrity, "it is not a proper subject for negotiation and the exchange of a *quid pro quo*" compromise of a pending civil action brought by Respondent against the bar complainants and other private parties. *In re Chalasani,* 92 F.3d 1300, 1310 (2d Cir. 1996).

(10) Respondent is entitled to a full and fair opportunity to be heard in a plenary evidentiary hearing in this Court on Respondent's substantive and procedural due process claims of prosecutorial misconduct and retaliation by New York bar counsel against Respondent, a cooperating witness and whistleblower in a federal criminal investigation of the bar complainants triggered by United States District Judge Robert L. Patterson of the Southern District of New York making a farce and mockery of the underlying New York disciplinary proceeding. *In Re Quarls,* 158 U.S. 532, 536 (1895); *Daniels v. Williams,* 474 U.S. 327, 331 (1986); *In re United States,* 565 F.2d 19, 22 (2d Cir. 1977).

As further support for this Motion Respondent attaches as Exhibit A herein a copy of Brief of Respondent-Appellant filed on September 7, 2005 with the Court in *In Re Israel Weinstock,* No. 05-2672-cv. That related case is on direct appeal of a final order of federal reciprocal disbarment entered on March 17, 2005 by the United States District Court for the Southern District of New York. Respondent incorporates herein by reference all the facts, legal issues and arguments presented therein. The appeal is now scheduled for oral argument on November 7, 2005 before a merits panel of this Court. The Respondent also

has a direct appeal pending in this Court challenging on due process grounds his federal reciprocal disbarment by the United States District Court for the Eastern District of New York entered on May 25, 2002. *Weinstock v. Grievance Committee of the United States District Court for the Eastern District of New York*, No. 04-2735-cv. On March 25, 2005 Respondent filed his Response to an Order to Show Cause why his direct appeal of the federal reciprocal disbarment by the Eastern District of New York should not be dismissed as frivolous which is now decisional. A copy of the Response to the Order to Show Cause in No. 04-2725-cv is attached hereto as Exhibit B.

The operative facts and the procedural history of Respondent's 6 year due process challenge to his New York disbarment tainted by a *quid pro quo* offer of settlement and compromise presented to Respondent by corrupt New York bar counsel acting under color of law on behalf of private bar complainants that Respondent vehemently rejected in writing before the bar complaint was filed on May 26, 1999 by New York bar counsel with the New York Supreme Court, Appellate Division, Second Judicial Department, *In the Matter of Israel Weinstock*, No. 99-05610 are fully developed in the attached submissions. Due process, fundamental fairness and public policy is clear – there can be "no taint of compromise" in fiduciary disbarment proceedings alleging professional misconduct by any officer of the Court by bar counsel horse trading on behalf of the bar complaints instead of pursuing the vigorous prosecution and removal of an alleged unfit attorney in the furtherance of the public interest to ensure that attorneys conduct themselves as members of a learned profession grounded in trust, honesty and integrity required of every licensed fiduciary.

Accordingly, for the reasons presented herein, Respondent prays that the Court in the interest of judicial economy and uniformity of decisions on common questions of law and fact, enter an order assigning this original disciplinary proceeding arising directly under Rule 46(b)(1)(A) of the Federal Rules of Civil Procedure and the related direct appeals noted above to the panel conducting oral argument no November 7, 2005 in No. 05-2672-cv; enter an order appointing a special master for evidentiary hearing and report to the Court on disputed factual matters as required by Rule 46(b)(3) of the Federal Rules of Appellate Procedure and Local Rule 46(f) and thereafter upon Respondent establishing by clear and convincing evidence that attorney discipline by this Court is unwarranted, permanently revoke this Court's order of federal reciprocal disbarment entered in this matter on October 17, 2005.

Respectfully submitted,

ROBERT S. CATZ
1600 28th Street, N.W.
Washington, D.C. 20007
(202) 276-6088

Counsel for Respondent
Israel Weinstock